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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1955.

No. .....

C. E. Owens, Mrs. C. E. Owens, O. O. Owens and Nabob Oil Company, *Appellants,*

vs.

Oklahoma Turnpike Authority, *Appellee.*

APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM JUDGMENT OF THE SUPREME COURT OF OKLAHOMA.

The Appeal herewith presented is from the judgment and opinion of the Supreme Court of Oklahoma rendered in the consolidated cases styled

No. 35435

C. E. Owens, Mrs. C. E. Owens, O. O. Owens and Nabob Oil Company, Plaintiffs in Error,

vs.

Oklahoma Turnpike Authority, Defendant in Error.

and

No. 35632

C. E. Owens, Mrs. C. E. Owens, O. O. Owens and Nabob Oil Company, Plaintiffs in Error,

vs.

Oklahoma Turnpike Authority, Defendant in Error.

and appealed separately to that court.

This appeal presents such incredible procedure and such complete and absolute disregard, by the District Court of Creek County and the Supreme Court of Oklahoma, of rights established by Amendment XIV to the Constitution

of the United States, of controlling decisions of this Honorable Court and of the Oklahoma Supreme Court, itself, construing said amendment and rights thereunder that, for clarity and the convenience of this Court, there should be made the following

Preliminary Statement.

Although such two appeals, and records or case-mades thereof, were filed in the Supreme Court of Oklahoma, each of which records reflected two different and extensive hearings in the District Court of Creek County, Oklahoma, the records of both the above-captioned cases were required to present to the Supreme Court of Oklahoma the single case in the lower court. Subsequently, such two appeals were consolidated by order of the Supreme Court of Oklahoma.

For greater clarity it should be here stated that prior to the jury trial of the issue of compensation and prior to filing Appeal No. 35435, there was filed in the Supreme Court of Oklahoma on November 10, 1951, Cause No. 35327 styled Nabob Oil Company and O. O. Owens, Petitioners, v. Kenneth Hughes, Judge of the District Court of Creek County, Respondent, wherein the petitioners sought review of the unlawful orders, reflected in the case-made of Appeal No. 35435 here involved, theretofore made, entered and enforced by said District Judge, disclaiming jurisdiction of and refusing to hear or consider or to permit introduction of evidence upon the jurisdictional issues and Federal questions raised by all the appellants' pleadings challenging the right, power and necessity of Oklahoma Turnpike Authority to condemn the property involved in this appeal; also challenging the character of Turnpike's proposed use of said property; and further charging that Oklahoma Turnpike Authority and its co-conspirators were fraudulently

and maliciously exercising the right of eminent domain for private gain and profit—which pleadings are also reflected by the case-made or record of Appeal No. 35435.

In said proceeding No. 35327 the petitioners invoked the Oklahoma Supreme Court's general superintending control of inferior courts authorized by the Constitution of the State of Oklahoma, and sought a writ of prohibition prohibiting said District Court and Judge from proceeding in excess of its jurisdiction and from enforcing said unlawful orders; also from making and enforcing similar additional unlawful orders—designed and intended to deprive all appellants herein of a forum and their right to litigate and to have adjudicated Turnpike's asserted right, power and necessity to condemn appellants' property as well as the character of the proposed use of the property being condemned —which said respondent Judge had stated he intended to make and enforce. The purpose of said unlawful orders was to force to jury trial the issue of compensation and to place Turnpike in possession of the property being condemned before, and without permitting, adjudication of appellants' constitutional rights and such Federal questions. The Oklahoma Supreme Court on November 14, 1951, summarily denied appellants Nabob Oil Company and O. O. Owens review of said unlawful orders and denied issuance of the requested writ of prohibition.

Again—in a further effort to obtain an adjudication of the constitutional issues and Federal questions before being unlawfully dispossessed—and five days after Appeal No. 35435 was filed in the Supreme Court of Oklahoma Appellants herein filed in the Supreme Court of Oklahoma in Appeal No. 35435 their Petition for Writ of Prohibition seeking to prohibit the Judge of the District Court from issuing its

Writ of Assistance placing Turnpike in possession of the condemned property. The Petition and Writ were summarily denied February 20, 1952, the same day the Petition was filed.

The records of said appeals disclose that the arbitrary, capricious and unlawful orders and rulings of the trial judge or court, violative of the Constitution of the State of Oklahoma and of the laws of the State as construed and settled by former decisions of the Supreme Court of Oklahoma, and violative of the Fourteenth Amendment to the Constitution of the United States, were enforced throughout all hearings and the entire case in the District Court;

That by said unlawful orders and rulings the trial court disclaimed jurisdiction of the issues raised and presented by the defendants' pleadings challenging the constitutionality of the Oklahoma Turnpike Act, Title 69 O. S. A. 1951, Sec. 651, *et seq.*, challenging the asserted right, power and necessity to condemn the property involved, and challenging the character of the proposed use to which the property condemned was to be put;

That by said arbitrary, capricious and unlawful orders the trial judge or court disclaimed jurisdiction of and excluded all evidence upon and refused to hear or consider any evidence tendered by appellants in support of their pleadings further charging Oklahoma Turnpike Authority, in conspiracy with others and as a stooge and tool for its co-conspirators, was fraudulently exercising the power of eminent domain for private gain and profit;

That by threatening condemnation and destruction of the most vital part of appellants' property, which, in turn, would totally destroy the value of all of appellants' property for impounding water—the highest adaptable use of

appellants' property—for repressuring 42 oil pools, within a radius of 10 miles of appellants' property, and recovering therefrom many millions of barrels of oil not otherwise recoverable, Turnpike and its co-conspirators sought to force appellants to sell their property for a trifle compared with its great and extraordinary value;

That if all of appellants' property, of great and extraordinary value for such peculiar use and purpose, thus threatened with destruction could not be acquired for a trifling consideration for the use, benefit, advantage and profit of said conspirators, said conspirators sought by said unlawful orders to obtain possession of and maliciously and with such sinister purpose to destroy the usefulness and value of appellants' property for impounding water before the right to condemn said property could be adjudicated. All said unlawful orders were subsequently approved and affirmed by the judgment and opinion of the Supreme Court of Oklahoma.

The trial court excluded all evidence, and refused to hear or to consider any evidence, on the constitutional issues and federal questions so raised and sought to be presented. In violation of the Constitution of the United States, of controlling decisions of the Supreme Court of the United States and of the Supreme Court of Oklahoma—and for the purpose of placing Turnpike Authority in possession of the property being condemned before its asserted right and power and necessity to condemn and the character of the proposed use of the property could be adjudicated—and without adjudicating or permitting adjudication of such federal questions, the trial judge forced to jury trial the issue of compensation in order to issue its writ of assistance; and under color of pretended legal right wrongfully ousted

appellants and placed Turnpike Authority in possession of and enabled it to destroy the property condemned and its usefulness for impounding water and the value of appellants' remaining property.

The foregoing may seem an incredible statement of improbable if not impossible procedure, or may seem a fantastically prejudicial narrative of any court's conduct. However, such statement is corroborated in its entirety by the admissions of Oklahoma Turnpike Authority filed in the Supreme Court of Oklahoma. On pages 110-111 of its Answer Brief, the Turnpike Authority made the following argument and admissions:

> "All condemnation cases present two basic questions: *First,* the right to condemn; *second,* the amount of compensation to be paid for the property involved. The amount of compensation cannot be tried to a jury until after the right to condemn has been established. The right to condemn or the lack of the power can be presented to the court only in the form of exceptions to the Commissioners' report. Owens, Nabob, *et al.*, have questioned the right of the Turnpike to condemn this property at each step of the proceedings.
>
> "In the Answer filed by Owens and Nabob (C-m. 2, 29) it is asserted that it is not necessary for the Turnpike to condemn any portion of the land described in its Petition; the power to condemn the land for the purposes set forth in the Petition is denied; that the construction of the Turnpike is for private gain and not public use; that the authority granted to the Turnpike has been used arbitrarily and capriciously, and therein it is asked that the proceedings be quashed and that injunction issue barring the Turnpike Authority from interfering with the possession of Nabob's property.
>
> "That right had never been admitted, nor had it

been adjudicated by the trial court. In *Town of Ames* v. *Wybrant,* 203 Okl. 307, 220 P. 2d 693, this Court said:

> 'Therefore the establishment of the right to condemn is a prerequisite to any right of possession by the condemnor,'

and referring to the case of *Wrightsman* v. *Southwestern Natural Gas Co., supra,* the court in the *Wybrant* case continues;

> 'Therein we expressly held that the landowner is entitled to challenge in the condemnation proceeding the right to condemn and have that question judicially determined prior to the final determination of the award for compensation and damages * * *'."

As admitted by Turnpike Authority, appellants were denied a forum in which to litigate their constitutional rights. They were deprived of their property by being unlawfully dispossessed, and its value and usefulness destroyed without just compensation and due process of law and were denied the equal protection of the law, all in violation of the Fourteenth Amendment to the Constitution of the United States.

As admitted by Turnpike, those constitutional issues and federal questions were continually raised and sought to be urged but were ignored by the trial court. Those issues and federal questions were also subsequently ignored by the Supreme Court of Oklahoma.

In the first of the above-captioned cases (No. 35435) appellants (Plaintiffs in Error below) sought review by the Supreme Court of Oklahoma of the aforesaid orders and rulings made by the judge of the District Court of Creek County, Oklahoma:

(a) disclaiming jurisdiction of the issues raised by ap-

propriate pleadings, properly filed in said District Court, challenging the asserted right, power and necessity to condemn appellants' property involved and the character of the proposed use to which such property should be put, and further alleging that said property was being condemned for private gain and not for public use; and

(b) disclaiming jurisdiction of, and refusing to hear or consider or to permit introduction of evidence establishing the facts of the frauds—charged in said pleadings to have been perpetrated and being perpetrated by Oklahoma Turnpike Authority and its co-conspirators—to fraudulently exercise and in exercising the right of eminent domain for private gain and profit; said conspirators' objective being to acquire for a trifling consideration Appellants' property thus apparently threatened with confiscation or destruction; said property being of great and extraordinary value for impounding one hundred million barrels of pure fresh water which does not require chemical treatment and is peculiarly adapted to water flooding 42 oil pools located from one-fourth mile to ten miles of Appellants' lake-sites, to all of which oil pools such impounded water will flow by gravity and make possible at minimum expense the production of many millions of barrels of oil not otherwise recoverable—otherwise said co-conspirators sought to destroy appellants' property and its value for such unique and special purpose.

The evidence the trial judge or court excluded or refused to consider when tendered established the following facts:

That on July 20, 1950, Turnpike's representative warned O. O. Owens, as President and General Manager of appellant Nabob Oil Company, to immediately suspend construction of its No. 1 dam, located near the

extreme north boundary line of appellants' property, which dam was then partially completed and impounding approximately five million barrels of water; and further warned Nabob that Turnpike would condemn said dam and use it at its then height for the road bed of its toll road across the deep canyon in which said No. 1 dam was being built; and further warned Nabob that Turnpike would condemn sufficient of the existing lake to control the water impounded and prevent the surface of said lake from rising and jeopardizing the road bed for said toll road;

That Nabob promptly suspended work on said dam, moved its operations two miles south and commenced clearing the timber from the largest of appellants' three lake sites and the site for that dam, designated in the record as lake or lake-site No. 2 and dam or dam-site No. 2; that during the next several months Nabob completed clearing the timber from dam-site and lake-site No. 2, preparatory to commencing actual construction of said No. 2 dam. Number 2 dam was designed to impound more than 60 million barrels of pure fresh water in lake-site No. 2, which, in turn, was designed to be inter-connected with lake No. 3 in such manner that said two lakes could be maintained at a common level or at different levels and both lakes would be served by a single group of spillways. Dam No. 3 was designed to impound more than 26 million barrels of such pure fresh water;

That while such work was in progress, O. O. Owens, for Nabob, sought persistently but unsuccessfully to contact and to obtain from the Oklahoma Turnpike Authority, various of its Members and the Members or representatives of LeLeuw, Cather & Co., the Engineers in charge of locating and construction said toll road, definite information about the stated location of said toll road, and the warning that dam No. 1 would be condemned;

That before clearing the timber from dam-site and lake-site No. 2 had been completed but when the exact location of dam No. 2 became obvious to Turnpike—and when it had also become obvious to Turnpike that the most destructive route for the toll road across appellants' entire property, their dam sites and lake sites would be upon a course that diagonally bisected dam site No. 2, the largest and deepest part of lake site No. 2, that diagonally bisected lake site No. 3 and prevented inter-connecting lake sites No. 2 and No. 3 as planned by Nabob, which most destructive route was two miles south of Turnpike's previously designated route upon and along dam No. 1—Turnpike immediately changed its plans and the route for its toll road to the above mentioned most destructive location and course; and its representatives, by pretended but actually fraudulent negotiations, first sought for an indefinite consideration permission and carte blanc authority from C. E. Owens to construct said toll road two miles south of the previously designated route and along an undesignated route across the central 1,000 acres of appellants' entire property; that, later, said representatives sought to obtain from C. E. Owens, for a consideration of approximately $1,050.00, a deed to sufficient land upon which to construct, maintain and operate said toll road upon and across such central 1,000 acres without indicating within one-half mile the location of said toll road or the manner in which said toll road was to be constructed, and without otherwise indicating the injury and damage that would be done to appellants' largest (No. 2) dam or other dam sites and lake sites on appellants' property;

That when advised by C. E. Owens that Nabob Oil Company was engaged in clearing the timber from the largest dam-site and lake site for the construction of the largest dam designed to impound more than 6 million barrels of pure fresh water, and thus was the

principal interested party, said representatives abandoned their efforts to overreach C. E. Owens. Thereupon, Turnpike caused a survey to be made for such new and most destructive route for its toll road two miles south of the previously selected route. Such newly selected route cut diagonally through the central 1,000 acres of appellants' property, diagonally through the central 1,000 feet of dam-site No. 2, diagonally through the largest and deepest portion of lake-site No. 2, diagonally across the area selected by Nabob to connect lakes No. 2 and No. 3 together, and diagonally through lake site No. 3. Promptly thereafter, Turnpike's representatives sought to borrow from Nabob its abstracts of title to the central 1,000 acres of appellants' land upon which dam sites and lake sites No. 2 and No. 3 were located;

That, while seeking to borrow such abstracts from Nabob said representatives disclaimed any purpose or authority to negotiate with Nabob for right of way for said toll road. They also disclaimed knowledge of any proposed change of the route for said toll road previously located two miles north and so aligned that it would traverse lengthwise Nabob's No. 1 dam. Construction of that dam had been suspended several months previously upon Turnpike's demand, and notice of condemnation;

That, later the Right of Way Engineer for Turnpike sought to borrow the aforesaid abstracts. In the course of a six and one-half hour conference with O. O. Owens, Nabob's President and General Manager, said Engineer reluctantly admitted the route of said toll road had been changed and reluctantly produced a set of purported work plans for the construction of said toll road upon the proposed new route. Such plans showed with exactness where said proposed new route would bisect diagonally the largest dam and the site therefor, the southerly and largest part of that lake

site and also bisect diagonally the site for the second largest lake (No. 3) as well as bisect diagonally appellants' entire block of 2825 acres of land. Such work plans also showed clearly that such proposed location and the proposed construction would totally destroy the largest dam, the largest and second largest lake sites, as well as the usefulness and value of all of appellants' 2825 acres of land for impounding or using impounded water for water flooding oil pools or any other purpose ;

That said Right-of-Way Engineer admitted such damage would far exceed $5,000,000.00, and further admitted that if all three dams were completed, if all three lakes were full of water and if full-scale water flooding operations were in progress, Turnpike "would cut the dams, drain the lakes and build the toll road where and in the manner indicated by the work plans";

That said Engineer further admitted that neither he nor the other representatives who had contacted C. E. Owens and who had sought to borrow Nabob's abstracts had any authority to deal or negotiate with Nabob for a right of way; that all were authorized only to borrow the abstracts and that only the Turnpike Authority itself could negotiate with Nabob for such right of way, and that the Turnpike authority had not indicated it intended to do so;

That notwithstanding such admitted lack of authority to deal with Nabob, the principal interested party, and with full knowledge of Nabob's rights and interest in appellants' property and the fact that Nabob was actively engaged in developing appellants' property to impound 100,000,000 barrels of water, said Right-of-Way Engineer, subsequently by letter mailed to C. E. Owens and Mrs. C. E. Owens, pretended to confirm the phony offer alleged in said letter to have been $2,151.07 and to have been made to C. E. Owens by another representative for a deed to land for construc-

tion of the toll road, the location of which was not designated in said letter, no compensation for damage was indicated, and from said letter the damage could not be comprehended;

That, while consistently evading O. O. Owens, Nabob's President and General Manager, or avoiding giving any information about the proposed change or new location of the route of said toll road, said Turnpike Authority—in violation of the Turnpike Act (Title 69 O. S. A. 1951, Sec. 651, *et seq.*) purchased 40 acres of land, which Nabob had long held under lease, in a further effort to disrupt Nabob's developing its water impounding program—and soon thereafter caused to be filed in the District Court of Creek County against C. E. Owens and Mrs. C. E. Owens only its action to condemn the land involved herein;

That thereafter Turnpike caused two of its employees or agents to be appointed members of a board of three commissioners to assess the damage C. E. Owens and Mrs. C. E. Owens would sustain and to award compensation therefor in the amount of $3,170.00.

(The aforesaid second case-made (No. 35632) also discloses that subsequently the trial judge approved the pretended but fraudulent "negotiations" of Turnpike's representatives as sufficient compliance with the statute requiring good faith effort and negotiation to purchase as a prerequisite to maintaining condemnation proceedings.)

The two aforesaid case-mades or records disclose that, by the aforesaid methods and procedure, said conspirators and Oklahoma Turnpike Authority were fraudulently exercising its claimed power of eminent domain to construct a toll road upon and across said property at such place and in such manner as would completely destroy all of appellants' property for the purpose of impounding water for

water flooding operations before the asserted right and power and necessity to condemn the property and the character of its proposed use could be finally adjudicated;

That the reason and malicious purpose of destroying said property was to deprive appellants of the benefits and advantages they enjoyed and would enjoy by controlling the source and supply of impounded water peculiarly suitable for water flooding operations.

In both the aforesaid appeals and case-mades Appellants (Plaintiffs in Error below), in their pleadings, charged that the Oklahoma Statute creating the Oklahoma Turnpike Authority, defining its powers and duties and alleged purposes was violative of the Constitution of the State of Oklahoma and the Fourteenth Amendment to the Constitution of the United States of America in addition to being fraudulently used and enforced.

The case-made or record of said case No. 35435 reflects the proceedings, in the first two hearings only, in the District Court of Creek County. It discloses that Oklahoma Turnpike Authority began its condemnation proceeding against C. E. Owens and Mrs. C. E. Owens only, as hereinbefore stated, although well knowing that Nabob Oil Company was the principal party interested and at its sole expense was then engaged in the construction of dams to impound water on appellants' property to be used in repressuring oil producing pools ranging from close promixity to said lakesites to a distance of eight to ten miles therefrom, and further well knowing that appellants' property was of the great and extraordinary value for the peculiar uses and purposes mentioned;

Also, said record reflects that in their efforts to save their property from needless destruction appellants offered

unusual concessions, *viz.*: a free right-of-way for a slightly changed route over smoother land upon which the toll road could be constructed at tremendously less cost and that would not destroy the lake sites and dam sites; and also offered reimbursement of any loss sustained in changing the proposed route and to pay the excess, if any, in the cost of constructing said toll road on such less destructive route; that such offers were rejected with the admission that the route destructive to appellants' property was not necessary but was "more desirable," without indicating the reason for the desirability;

Also, said record reflects that in the first proceeding Oklahoma Turnpike Authority, without notice to defendants C. E. Owens or Mrs. C. E. Owens, or to anyone else, had procured the appointment of two of its employees or agents as members of a Board of three Commissioners to appraise the land involved and to assess at $3,170.00 the damages, direct and indirect, that would be caused to appellants' property by construction of the toll road; that Turnpike Authority's Resolution of Necessity designated a right of way only; that its Petition sought condemnation of the fee simple title, less the oil and gas rights, to a strip of land 300 to 400 feet wide bisecting diagonally appellants' entire property consisting of 2825 acres of land, bisecting diagonally the site for Nabob's largest dam and the deepest and largest part of its largest lakesite (No. 2), and bisecting diagonally the main body of its parallel lakesite (No. 3) less than one mile distant.

(It should be here stated parenthetically the Record of the proceedings in the Supreme Court of Oklahoma discloses that, in its Opinion, the Supreme Court deprecatingly referred to the property condemned as "35 acres of rural

land." No mention was made therein, and there is not therein the slightest indication of the true extent, character or value of appellants' 2825 acres of land before said land, the sites for the largest dam and two largest lakes thereon, were bisected diagonally by the toll road; nor is there the slightest indication in said Opinion that all said land as a unit was peculiarly adapted to impounding 100 million barrels of pure fresh water that would not be polluted, that would not require chemical treatment for water flooding purposes, that would supply a minimum average of 50,000 barrels daily during periods of minimum rainfall and maximum evaporation and having a value of 2-3/4 cents per barrel for water flooding purposes—all established by uncontradicted testimony of expert hydraulic and petroleum engineers. The court's characterization of the property involved as "35 acres of rural land" disparages its later admission that on one occasion $5,163,250.00 was assessed as damage appellants would sustain from construction of the toll road. It is impossible to read the Opinion and gather therefrom that the Supreme Court of Oklahoma was either interested in or had any conception of the character or useful value of this 2825 acres of land. Said Opinion flatly states the court's refusal to read the records or case-mades to ascertain the issues and facts of the case.)

Continuing—

Also, the casemade in Appeal 35435 reflects that in said first hearing, as the facts of Turnpike's Authority's conduct and that Nabob Oil Company was an indispensable party but had not been made a party defendant in said condemnation suit became obvious, Turnpike amended its Petition, without change other than naming Nabob Oil Company and O. O. Owens as additional parties defendant.

Thereupon, the District Court rejected the "Commissioners" report and award of $3,170.00;

Also, the case-made in Appeal 35435 reflects that, thereafter, the Judge of the District Court appointed another Board of Commissioners of three members, each of whom was disinterested and peculiarly qualified by intellectual honesty and extensive experience to properly appraise the property involved and to assess appellants' damage resulting from the construction of Turnpike's Authority's proposed toll road. After five days spent in careful inspection of the property and consideration of all the elements and factors which they understood were required by law, by their oaths of office and by the form of Report supplied them by Turnpike Authority, including the facts that:

(a) that after Nabob Oil Company had complied with Turnpike's request and had suspended further construction of the No. 1 dam,

(b) had moved its operations two miles to the south, had cleared the timber from dam site No. 2 and was engaged in clearing timber from the largest canyon designated as lake site No. 2,

(c) Turnpike Authority had promptly changed the (previously designated) route of its toll road from that upon and across incomplete dam No. 1 to a course two miles to the south,

(d) had aligned the newly selected route across appellants' property in such manner that it bisected diagonally their entire 2825 acres of land,

(e) that it bisected diagonally the site for the No. 2 dam and the deepest and largest part of lake site No. 2, designed to be largest of the three and would impound more than sixty million barrels of pure fresh water—almost twice as much as the other two lake sites,

(f) that it bisected diagonally the third lake site, and

(g) precluded the use for water flooding purposes of any of the water then impounded or that might thereafter be impounded in the lake site No. 1, and

(h) the newly selected route and the toll road constructed thereon would totally destroy the water flooding project then being developed by Nabob and totally destroy the highest adaptable use of all of appellants' 2825 acres of land,

said commissioners thereupon filed their report in which they awarded appellants compensation in the sum of $5,163,250.00, and struck from said form of report the finding that the land sought to be condemned was necessary for Turnpike's stated use—on the ground such finding was a judicial question outside their jurisdiction;

That, in summing up the various items of injury and damage to be compensated for said commissioners overlooked including, and thus failed to award, compensation for the injury and damage appellants would sustain by being deprived of the supply of impounded water for repressuring their numerous properties and those of others in any of the 41 pools and areas other than the nearest (Milfay) pool, to all of which pools and areas the water would flow by gravity from the lake sites.

That, following the procedure prescribed by the Constitution and the Statutes of the State of Oklahoma as construed by prior decisions of the Supreme Court of Oklahoma, Turnpike Authority promptly filed its objections to the aforesaid commissioners' report and award of $5,163,250.00, charging misconduct on the part of said commissioners, misconduct on the part of the defendant condemnees for being present with Turnpike's attorney during one period of the commissioners' inspection of the property; and

further charging that the sum awarded was ridiculous, and demanding said report be rejected, the commissioners be discharged and a new Board of Commissioners be appointed;

That Turnpike orally supplemented its written Objections with its flat refusal to pay the award, and further demanded that appellants be barred from accompanying the new commissioners upon their inspection of the property or be restrained from informing said new commissioners about any of the merits, characteristics or usefulness for any purpose of their property or any part thereof.

Said case-made discloses also that under the Constitutions of the United States and the State of Oklahoma and the Statutes of the State of Oklahoma, as construed by the Supreme Court of Oklahoma, Appellants (Defendants in the District Court proceeding) were limited as to time and method—of challenging Turnpike's asserted right, power and necessity to condemn their property and the character of the use to which it was to be put—to their filing objections to the aforesaid commissioners' report. (*Wrightsman* v. *Southwestern,* 173 Okl. 75, 46 P. 2d 925, and *Town of Ames* v. *Wybrant,* 203 Okl. 307, 220 P. 2d 693;)

That, in compliance with such procedure, appellants (Defendants in the District Court) filed their Objections in the nature of answers—challenging Turnpike's asserted right, power and necessity to condemn their property, the character of the proposed use to which the condemned property was to be put and the constitutionality of the Act (Title 69 O. S. A. 1951, Sec. 651, *et seq.*) creating Oklahoma Turnpike Authority and its claimed power of eminent domain—and cross-petitions charging collusion and conspiracy between Oklahoma Turnpike Authority and others to fraudulently exercise the right of eminent domain for the

purpose of despoiling appellants of their property or the use and control of it; and further charging that failing in such corrupt scheme and purpose, Turnpike was fraudulently exercising its claimed power of eminent domain in order to maliciously destroy appellants' property so as to deprive appellants of the benefits and advantages resulting from their ownership, and to thus prevent Nabob Oil Company's developing said property as a vast water flooding project of great and extraordinary value, in that by the use of such impounded water many millions of barrels of oil not otherwise recoverable could be recovered and produced from appellants' and others' properties adjacent to and reasonably near such lake sites, to all of which such impounded water would flow by gravity.

Said case-made also reflects that in the hearing on Turnpike's Objections to the aforesaid commissioners' report and award, the defendants (in the District Court—Appellants here) were denied a forum in which to present or litigate any of the issues raised by their pleadings, particularly those of conspiracy to fraudulently exercise the power of eminent domain to acquire appellants' property otherwise to maliciously destroy it; and were also deprived of the right of offering any evidence in support of their pleadings and were denied the right of challenging either in fact or law the asserted right, power and necessity for Turnpike Authority to condemn the property involved, and were further denied the right to litigate the character of use to which the property was proposed to be put.

Said case-made also discloses that, by the device of disclaiming jurisdiction of all such issues and questions as an excuse and pretended reason for excluding all testimony thereon or relating thereto, the trial judge further ruled

that Oklahoma Turnpike Authority in the exercise of its right of eminent domain was limited only by its ability to pay for property it condemned, unless the defendants could establish that more property in area was being condemned than was necessary for Turnpike's purposes; also that defendants were deprived the right to offer their evidence to show that Turnpike's Resolution of Necessity provided for the acquisition of a right-of-way, whereas in its Petition with exhibits attached and the form of the report supplied the aforesaid commissioners, it was condemning the land in fee less the oil and gas rights; also

That, in said hearing, and those subsequent, appellants were not seeking compensation but were seeking only to be heard upon the issues raised by their pleadings, particularly the true extent, nature and character of their property, its great and extraordinary value for a unique and special use, the lack of any necessity and equitable or logical reason for Turnpike to appropriate the designated property, which appropriation would destroy the usefulness and value of the whole of appellants' property; and to be heard upon the facts alleged of the conspiracy to despoil appellants of their property or the use and control of it, otherwise to destroy it and appellants' benefits and advantages arising from ownership of said property;

That, limited by the aforesaid procedure and the trial court's arbitrary and unlawful orders and rulings, appellants could only challenge Turnpike's asserted right, power and necessity to condemn and the character of the proposed use of the property by their pleadings and by argument; and were thus limited to defending the commissioners' and their own conduct and defending the aforesaid appraisal and award of $5,163,250.00; that Turnpike admitted that if said report and award were confirmed, such confirmation

would cause the designated destructive route to be abandoned because Turnpike would not pay the award—and would accordingly select another and different route.

Said case-made also discloses that Turnpike failed to establish the allegations in its Objections of misconduct on the part of said commissioners and appellants—notwithstanding the trial court restricted appellants' testimony of value to that part only of their property that would be totally destroyed by Turnpike's appropriation and to any possible usefulness and value, for water flooding the nearest (Milfay) pool only, of the damaged parts or remnants of their property; that, thus the trial court excluded the testimony on value of all their property as a unit and the value of its highest adaptable use *viz.*: for impounding water;

That, Turnpike thereupon filed its written demand for jury trial of the issue of compensation in order to effectuate the conspiracy to obtain possession of and to destroy the most vital part of appellants' property, and to destroy the value and usefulness of all said property for impounding water before Turnpike's asserted right and power and necessity to condemn and the character of the proposed use of the property could be adjudicated.

The aforesaid case-mades disclose (and Turnpike admits, *supra*, and *infra*) that, under Amendment XIV to the Constitution of the United States, and Article II, Section 24 of the Oklahoma Constitution and the settled law of the State (as construed by the Supreme Court of Oklahoma in *Wrightsman* v. *Southwestern*, 173 Okl. 75, 46 P. 2d 925, and *Town of Ames* v. *Wybrant*, 203 Okl. 307, 220 P. 2d 693) and under the provisions of the Turnpike Act (Title 69 O. S. A. 1951, Sec. 651, *et seq.*) the issue of compensation cannot be heard or considered by the trial court or judge or

submitted to a jury until challenges, in the form of objections to the Commissioners' report of the right, power and necessity to condemn and character of use have been finally determined judicially; also, if jury trial of the issue of compensation is demanded, the trial judge has no discretion and must grant it.

Said case-made in Appeal 35435 discloses that after Turnpike filed its aforesaid written demand for jury trial of the issue of compensation, it orally demanded that if said case could not be tried on the immediately impending jury docket the trial judge should resume further hearing of its objections to the commissioners' report and award of $5,-163,250.00, reject and vacate the same, discharge the commissioners and appoint another board;

That because of the excessively heavy jury docket and failing to force to jury trial the issue of compensation, the trial court over appellants' objections and protests complied with Turnpike's oral demand by resuming further hearing of its objections to the aforesaid commissioners' report and award of $5,163,250.00, although Turnpike did not withdraw its demand for jury trial;

That, to prevent such unlawful procedure, appellants filed their own written demand for jury trial, granting of which was mandatory and should have automatically set the case for trial on the next jury docket—and would allow appellants time and opportunity to obtain review by the Supreme Court of Oklahoma of the trial court's arbitrary and unlawful orders designed to and which did deny them a forum in which to litigate and to offer their evidence on the issues of the right and power and necessity to condemn and the character of the proposed use of the property; but

The trial court arbitrarily ignored appellants' written

demand for jury trial, summarily resumed further hearing of Turnpike's objections, denied appellants the right and leave to offer additional evidence or to complete their defense to Turnpike's objections, rejected the commissioners' report and discharged them, vacated their award, and announced its intention to subsequently appoint another (the third) board of commissioners.

Said case-made further discloses that at that point in the proceedings appellants filed, in the Supreme Court of Oklahoma, their Appeal No. 35327, hereinabove referred to on pages 2 and 3 seeking prompt review of the trial judge's arbitrary and void orders and rulings disclaiming jurisdiction of the Constitutional and Federal questions, and excluding and refusing to hear or to consider any and all evidence thereon or related thereto.

Therein appellants, relying upon the Oklahoma Supreme Court's own decisions in *Wrightsman* v. *Southwestern* and *Town of Ames* v. *Wybrant, supra,* also sought a writ of prohibition prohibiting the trial judge or court from proceeding with a jury trial of the issue of compensation until Turnpike's asserted right, power and necessity to condemn, the character of the proposed use of the condemned property, and particularly the facts of the alleged conspiracy to fraudulently exercise the power of eminent domain had been judicially determined.

(When said petition was presented, the Supreme Court of Oklahoma as hereinbefore stated, summarily entered an order refusing to exercise its jurisdiction to review the trial court's orders and to issue the writ of prohibition.)

Appellants contended in both Appeals No. 35435 and No. 35632, and urge here, that everything done by the trial judge or court after they filed their challenge of Turnpike's

asserted right and power and necessity to condemn and the character of the proposed use of the property involved was arbitrary, capricious, illegal, unlawful and void; and was designed to and did deny appellants a forum in which to litigate their constitutional rights and the Federal questions raised and sought to be presented; and was designed to and did deprive appellants of their property without due process of law; and was designed to and did deny them equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the Unite States; and was further designed to and did cause and result in the aforesaid Turnpike Act being construed and enforced in a manner repugnant to and violative of appellants' rights under said Fourteenth Amendment.

The case-made or record of the second above-captioned appeal (No. 35632) by duplication reflects the proceedings described in the fifth to eighth paragraphs next preceding. Thereafter it discloses:

(1) the illegal appointment of the last (third) board of commissioners,

(2) their refusal to inspect the property as required by law,

(3) their otherwise unlawful procedure,

(4) the trial court's confirmation thereof, and

(5) the trial court's promptly forcing to jury trial the issue of compensation;

That, in such jury trial, the trial court:

(a) rigidly adhered to its unlawful previous orders and rulings,

(b) further disclaimed jurisdiction of the constitutional issues and Federal questions raised by appellants' pleadings and their renewed challenge of Turn-

pike's asserted right, and power and necessity to condemn and of the character of the proposed use of the property being condemned,

(c) excluded all evidence on the aforesaid issues,

(d) refused to hear or to consider any evidence offered on those issues,

(e) refused to hear or to consider evidence on or argument about

(1) the constitutionality of the trial court's construction and enforcement of the Turnpike Act,

(2) the trial court's procedure being violative of the XIV Amendment to the Constitution of the United States, and

(3) violative of decisions of the Supreme Court of the United States and of the State of Oklahoma, construing the same.

Such second case-made or record (in No. 35632) discloses that in the jury trial the trial court also persistently adhered to its arbitrary, capricious and unlawful rulings and orders in the previous hearings designed to, and which did,

(1) restrict appellants' evidence of value and damage to part only of their property,

(2) to the value of the damaged remnants or parts of their property for water flooding only the nearest (Milfay) oil pool,

(3) exclude all evidence relating to or that would establish the value of and damage to the highest adaptable use of all their property for impounding water for water flooding properties in numerous other oil pools and areas, to all of which the water impounded in their lake sites would flow by gravity,

(4) all for the purpose of minimizing the jury verdict and award of compensation,

(5) while denying appellants a forum in which to litigate and their right to offer their evidence upon:

(a) the issue of Turnpike's conspiracy with others to fraudulently exercise its claimed right to condemn,

(b) their constitutional rights and the Federal questions raised by their pleadings which appellants sought, but were denied the right, to urge at every step or stage of the entire proceedings,

(6) all for the further purpose of placing Turnpike in possession of and permitting it to destroy appellants' property before its right to condemn could be finally adjudicated.

The designated portions of the aforesaid records, presented herewith for this Court's consideration, are supplemented with the material portions of the additional record of the consolidated appeals in the Supreme Court of Oklahoma. Such supplemental additional record discloses:

(a) that the Supreme Court of Oklahoma consolidated the two appeals and the records thereof for consideration and decision. One brief only was filed covering the issues presented, which interlocked and required concurrent consideration.

(b) that despite the facts and state of the Record reflected by the case-mades in Appeals No. 35435 and No. 35632, and despite Turnpike's admissions herein quoted—admissions of the trial court's arbitrary, capricious and unlawful denial to appellants of a forum, of their right to be heard upon and to have adjudicated the constitutional issues and Federal questions raised by their pleadings—the Supreme Court of Oklahoma, in its Opinion, treated the first appeal for review of the trial court's orders disclaiming jurisdiction of appellants' challenge of Turnpike's asserted right, power and necessity to condemn, of their challenge of the character

of the proposed use of the condemned property, of their allegations of fraudulent exercise of the right of eminent domain, and of the constitutionality of the Turnpike Act as an attempt to appeal from an interlocutory order and ordered said appeal dismissed. Thus, it avoided deciding all Federal questions presented. Thus, it effectuated the trial court's objective and purpose of denying appellants a forum and a hearing or consideration of any such questions and of depriving appellants equal protection of the law, and depriving them of their property without due process of law.

(c) that in considering the second appeal (No. 35632) the Supreme Court of Oklahoma refused to consider the issues presented in the first appeal (No. 35435) which were basic to the second appeal (No. 35632) and entirely ignored Appellants' renewed challenge of Turnpike's asserted right, power and necessity to condemn and the character of the proposed use of the property, as well as the allegations of fraudulent exercise of the right of eminent domain, and thus again avoided deciding those questions or applying thereto its former decisions in *Wrightsman* v. *Southwestern Natural Gas Co.*, 173 Okl. 75, 46 P. 2d 925, and *Town of Ames* v. *Wybrant*, 203 Okl. 307, 220 P. 2d 693. The Supreme Court of Oklahoma thereby ignored Turnpike's frank admissions—which for this Court's convenience are herewith repeated—made to it in the following language:

> "All condemnation cases present two basic questions: *first*, the right to condemn; *second*, the amount of compensation to be paid for the property involved. The amount of compensation cannot be tried to a jury until after the right to condemn has been established. The right to condemn or the lack of the power can be presented to the court only in the form of exceptions to the Commissioners' report. Owens, Nabob, *et al.*, have ques-

tioned the right of the Turnpike to condemn this property at each step of the proceedings.

"In the Answer filed by Owens and Nabob (C-m. 2, 29) it is asserted that it is not necessary for the Turnpike to condemn any portion of the land described in its Petition; the power to condemn the land for the purposes set forth in the Petition is denied; that the construction of the Turnpike is for private gain and not public use; that the authority granted to the Turnpike has been used arbitrarily and capriciously, and therein it is asked that the proceedings be quashed and that injunction issue barring the Turnpike Authority from interfering with the possession of Nabob's property.

"That right had never been admitted, nor had it been adjudicated by the trial court. In *Town of Ames* v. *Wybrant*, 203 Okl. 307, 220 P. 2d 693, this Court said:

> 'Therefore the establishment of the right to condemn is a prerequisite to any right of possession by the condemnor,'

and referring to the case of *Wrightsman* v. *Southwestern Natural Gas Co., supra,* the Court in the *Wybrant* case continues:

> 'Therein we expressly held that the landowner is entitled to challenge in the condemnation proceeding the right to condemn and have that question judicially determined prior to the final determination of the award for compensation and damages * * *'." (Pages 110, 111 of Turnpike's Answer Brief.)

The Supreme Court did not discuss Appellants' issues of constitutional law despite Turnpike's admissions that their legal defense was paramount, that they had timely presented it and the trial court had refused to consider it.

(d) The Opinion of the Supreme Court of Oklahoma expressly states the Court's flat refusal to read the records of the case, prepared with great effort, at extraordinary expense and under adverse conditions, which were filed in strict conformity with the Constitution and settled law of the State of Oklahoma.

(e) Said Opinion discloses a lamentable and wholly unwarranted lack of knowledge of the issues of fact and law presented, and

(f) that said court evaded, or avoided, considering or deciding any of said issues, constitutional or otherwise, while by implication only it pretended to do so.

(g) Said Opinion discloses that such procedure caused the Oklahoma Supreme Court erroneously to state the character of the proposed use of the property had not been raised or questioned—

(h) notwithstanding Turnpike's own admissions to the contrary, as above quoted;

(i) that by such expediency the Supreme Court of Oklahoma avoided deciding that issue and further ignored its own decisions, and avoided applying such decisions thereto, thereby depriving appellants of the equal protection of the law;

(j) that such Opinion effectuated the conspiracy to destroy appellants' property without just compensation therefor, and

(k) without final adjudication of the right to condemn the property, thereby denying appellants uniform application and equal protection of the law, and

(l) deprived appellants of their property without due process of law, all in violation of the XIV Amendment to the Constitution of the united States,

Finally—by the device of unreasonably delaying entering a proper order staying its Mandate on its decision and Opinion, pending an appeal to this Court, by the further device of entering an onerous order in con-

flict with the Rules of this Court and, after much effort on the part of appellants, belatedly entering a proper order that permitted appellants to perfect this appeal, coupled with its aforesaid conduct and Opinion, such supplemental record discloses a consistent attempt and purpose on the part of the Supreme Court of Oklahoma to further deprive appellants of judicial determination of the constitutional and Federal questions herewith presented.

JURISDICTIONAL STATEMENT ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM THE SUPREME COURT OF OKLAHOMA.

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1955.

No. .....

C. E. Owens, Mrs. C. E. Owens, O. O. Owens and Nabob Oil Company, *Appellants*,
vs.
Oklahoma Turnpike Authority, *Appellee*.
Statement as to Jurisdiction.

APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM JUDGMENT OF THE SUPREME COURT OF OKLAHOMA.

The Appellants, pursuant to United States Supreme Court Rules 13(2) and 15, file this their statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment of the Supreme Court of Oklahoma, and should exercise such jurisdiction in this case.

Opinion of Court Below.

The Supreme Court of Oklahoma delivered a written opinion which has been published in 283 Pacific 2nd, 827. Copy of such written opinion is attached to this jurisdicttonal statement.

Jurisdiction.

The appeal is from a final decision made and entered by the Supreme Court of Oklahoma affirming in whole the rulings, orders and judgment, of the District Court of

Creek County, Oklahoma, in a proceeding in eminent domain brought under 69 O. S. A. 1951, Sec. 658.

Judgment Appealed.

The date of the decision of the Supreme Court of Oklahoma is December 7, 1954. The date the petition for rehearing was overruled is May 3, 1955. The Notice of Appeal to the Supreme Court of the United States was filed July 29, 1955. Such notice of appeal was filed in the Supreme Court of the State of Oklahoma, in the Office of the Clerk.

Jurisdictional Statute.

The Supreme Court of the United States has juridsiction to review by direct appeal the judgment and decision complained of by the provisions of 28 U. S. C. A., Sec. 1257(2).

Cases Sustaining Jurisdiction.

The following decisions are believed to sustain the jurisdiction of the Supreme Court of the United States to review the judgment and decision complained of on direct appeal:

Backus v. *Fort Street Union Depot Company,* 169 U. S. 557, 565;

McCoy v. *Union Elevated Ry. Co.,* 247 U. S. 354, 363;

Roberts v. *City of New York,* 295 U. S. 264, 277-278;

New York, ex rel. Bryant, v. *Zimmerman,* 278 U. S. 63, 66.

State Statute Involved.

The statute of the State of Oklahoma that is involved in this Appeal is 69 O. S. A. 1951, Sec. 658 (Oklahoma Session Laws 1947, p. 484, Sec. 8), which reads:

"*Condemnation Proceedings.* Whenever a reasonable price cannot be agreed upon, or whenever the owner is legally incapacitated, or is absent, unknown, or un-

able to convey valid title, the Authority is hereby authorized and empowered to acquire, by the exercise of the power of condemnation in accordance with and subject to the provisions of any and all existing laws and statutes applicable to the exercise of the power of condemnation of property for public use, any land, property, rights, rights-of-way, franchises, easements, or other property deemed necessary or convenient for the construction or the efficient operation of any turnpike project or necessary in the restoration of public or private property damaged or destroyed. That such damage shall include among other proper elements damage by reason of making the remaining portion of such land or premises or farming or useable unit thereof being rendered inaccessible. In any condemnation proceedings the court having jurisdiction of the suit, action, or proceeding may make such orders as may be just to the Authority and to the owners of the property to be condemned and may require an undertaking or other security to secure such owners against any loss or damage by reason of the failure of the Authority to accept and pay for the property, but neither such undertaking or security nor any act or obligation of the Authority shall impose any liability upon the State or the Authority except such as may be paid from the funds provided under the authority of the Act. Laws 1947, p. 484, Sec. 8."

The language above "any and all existing laws and statutes applicable to the exercise of the power of condemnation of property for public use" refers primarily to either 66 O. S. A. 1951, Sec. 53 (R. L. 1910, 1400), the statute relating to taking by railroads by eminent domain, or 69 O. S. A. 1951, Sec. 46 (Oklahoma Session Laws 1923-24, Ch. 48, p. 56, Section 11; Oklahoma Session Laws 1929, Ch. 258, p. 368, Section 1; Oklahoma Session Laws 1949, p. 500, Section 2), the statute relating to the taking by the State of Oklahoma by eminent domain for highway purposes.

Questions Presented.

69 O. S. A. 1951, Section 658 (Laws 1947) on its face confers on appellee the power to exercise eminent domain. The District Court of Creek County, Oklahoma, construed Section 658, above, whether based on Section 53 or Section 46, above, so as to deprive appellants of their property without due process of law and deny them the equal protection of the law guaranteed by the XIV Amendment, despite their pleadings and claims thereunder, and this was affirmed by the Supreme Court of Oklahoma. The District Court of Creek County refused to follow the law of eminent domain, settled under both federal and state constitutions, by such interpretation and by refusing to hear or decide—before determining the issue of compensation and before dispossessing Appellants from their property—the following issues:

(*a*) Whether appellee had the right and power to exercise eminent domain.

—*Porto Rico Telephone Company* v. *Porto Rico Communications Authority,* (C. A. 1) 189 F. 2d 39, 44, cert. den. 324 U. S. 830;

Wrightsman v. *Southwestern Natural Gas Co.,* 173 Okl. 75, 46 P. 2d 925, 931;

Town of Ames v. *Wybrant,* 203 Okl. 307, 220 P. 2d 693, 695.

(*b*) Whether there existed a necessity (in a judicial as differentiated from a legislative or ministerial sense) to take Appellants' property.

—*United States, ex rel. T. V. A.,* v. *Welch,* 337 U. S. 546;

Lewis v. *United States,* (C. A. 9) 200 F. 2d 183, cert. den. 345 U. S. 907;

Simmonds v. *United States,* (C. A. 9) 199 F. 2d 304, 306;

City of Tulsa v. *Williams,* 100 Okl. 116, 227 Pac. 876.

(*c*) Whether appellee was actuated by bad faith, abuse of discretion and fraudulent motives in locating and relocating its right of way and claiming necessity to take appellants' property.

—*United States, ex. rel. T. V. A.,* v. *Welch, supra;*

Lewis v. *United States, supra;*

Simmonds v. *United States, supra.*

(*d*) Whether Appellants' property was being taken for a public use.

—*United States, ex rel. T. V. A.,* v. *Welch, supra;*

Simmonds v. *United States, supra.*

The Supreme Court of Oklahoma in affirming the judgment of the trial court refused to consider and decide the foregoing issues, and in addition refused to decide the following issues:

(*a*) Whether Appellants' property was taken without just compensation by the action of the trial court in excluding from the consideration of the jury the issue of whether Appellants' property had a value based upon its availability and adaptability for a particular use.

(*b*) Whether the trial court denied to appellants the equal protection of the laws by refusing to apply to appellants the law of eminent domain as it had been construed and applied to all other condemnees by the courts of Oklahoma.

Where the proceedings in the trial court differ materially from that established and consistently applied in all oth-

er cases, and the judgment of the courts of Oklahoma, in this case, prescribes a rule of law in absolute disregard of Appellants' right to just compensation, the right of Appellants to have the Supreme Court of the United States examine the proceedings complained of is undoubted.

In presenting these issues it is necessary for the Appellants to call attention to the discrimination habitually practiced against them by the trial court, the hostile and unjudicial atmosphere of the trial and the indifference of the Supreme Court of Oklahoma to the record and the issues presented to it as manifested by its vague, lackadaisical opinion. This would be so obvious to this Court from the transcript that our failure to comment thereon would be inexplicable.

We cannot ask the Supreme Court of the United States to review and correct the rulings and decisions of the courts of Oklahoma on non-federal issues unless such rulings and decisions, as applied to Appellants, are so flagrantly arbitrary and discriminatory as to involve denial of equal protection of the laws. Therefore, when evidence is excluded and rules of law established in other cases are withheld or ignored, as in this case, so that the proceedings by which appellants' property is taken differ materially from established law to their prejudice, we assert that equal protection of the law is denied.

Statement of Case.

Appellants own a tract of 2825 acres of land in Creek County Oklahoma.

Appellee was created by the Legislature of Oklahoma in 1947. In 1950, 1951 and 1952 it constructed a toll road between the outskirts of Tulsa and Oklahoma City. In doing this, it acquired rights of way either by purchase or eminent domain. It proposed to locate its right of way along the extreme north side of Appellants' property—then changed the route to a course across the aforementioned tract of land most destructive of Appellants' property and undertook to acquire the right of way by eminent domain.

Appellants had owned their land for many years. It was acquired for the purpose of embracing a watershed, lake sites and dam sites, and was so treated and being developed. Prior to 1947 Nabob Oil Company had fully prepared plans for constructing three dams across canyons on this land to create lakes to impound water. Dam No. 1 was to be near the north boundary of the land, and Dams Nos. 2 and 3 about two miles to the south. These latter dams were so located that the lakes thereby created would be inter-connected and would complement each other through a connecting conduit—one serving to impound the overflow from the other. The three lakes thus planned were to have had a combined capacity of approximately 100 million barrels of water, and could permit withdrawal of 45 to 50 thousand barrels per day while maintaining adequate reserve storage, from average rainfall on the watershed.

Nabob Oil Company is the owner and operator of oil wells on leases in the nearby Milfay Pool (equal to about 27% of the pool) and intended to use the water thus to be impounded for waterflooding its wells in the pool as a means

of secondary recovery of oil. In addition, it planned to offer the excess water for sale to other lease operators in the pool. Moreover, Nabob Oil Company had other oil properties, both producing and prospective, in the general area which would be able to use the entire output of the lakes if it was decided not to sell any water. In addition to all of this, the elevation of this drainage area and the lakes was such that water therefrom would flow by gravity to forty-one other oil pools, none more distant than 12 miles. It was planned to offer to sell any excess water to other lease operators in these pools. Nabob Oil Company's evidence on this would have established all of these facts conclusively. This land could have been shown to have a value based on its natural state as well as a value based on its usefulness in the reasonably near future by its being devoted to the prospective use for which it was available and adapted, and for which it was being developed by Nabob Oil Company.

The trial court refused to hear evidence on this element of value, saying that the possibility was too remote and therefore had no value. (Tr. 64-65)

Nabob Oil Company began constructing dam No. 1, and had it about half completed when, in July 1950, after the Supreme Court of Oklahoma had validated the bonds appellee intended to issue to pay for the toll road, appellee directed Nabob Oil Company to desist from further work on the dam because the proposed toll road would be located so as to use that location and utilize that portion of the dam then in place. Nabob Oil Company desisted and did no further work on that dam.

Nabob Oil Company thereupon moved its construction operations two miles south and began clearing dam site and lake site No. 2. When this clearing was substantially completed appellee changed the route of its proposed road and

located it so as to destroy dam site No. 2 and lake sites No. 2 and No. 3. By the same act the useful value of Dam No. 1 was destroyed.

June 7, 1951, appellee commenced eminent domain proceedings against C. E. Owens and Mrs. C. E. Owens (Tr. 14-27). It was forced to abandon this proceeding for defect of proper parties and improper appraisal.

August 30, 1951, appellee began eminent domain proceedings against all Appellants (Tr. 28-34).

September 20, 1951, Appellants, Nabob Oil Company and O. O. Owens, filed a pleading denominated "Answer of O. O. Owens and Nabob Oil Company to Amended Petition" (Tr. 35-52) raising the Constitutional issues in the following manner:

(*a*) the necessity to take appellants' land—

> "For further answer, these answering defendants expressly deny that in the construction of a toll road or Turnpike project, it is necessary for petitioner to appropriate the lands described in said Amended Petition, or any part or portion thereof." (Tr. 38)

(*b*) that appellee could not lawfully exercise the power of eminent domain—

> "These answering defendants further expressly deny that the Oklahoma Turnpike Authority is empowered and authorized to exercise the powers of condemnation to appropriate the above describel land for construction and operation of said Turnpike Project, or otherwise." (Tr. 38)

(*c*) the malice, bad faith and improper motives of the Oklahoma Turnpike Authority in its decision to relocate its right of way so as to take appellants' land—

> "Answering defendants further aver that by rea-

son of the facts and circumstances hereinabove set forth, and the great uncertainty whether the costs of said toll road can ever be repaid from the revenues thereof, plaintiff, its officers, agents, and employees have conceived a design and purpose in the interests of the private speculators whose welfare is their private concern, to acquire wherever possible property of great potential value, ostensibly for the use in the construction of said toll road but actually in order to exploit its value for private gain; that with full knowledge of all the facts and circumstances hereinabove set forth, the plaintiff and its said officers and agents have from time to time shifted and realigned the route of said toll road in the vicinity of the property herein involved, first in such manner as to effectively destroy the smaller lake and dam already constructed; that having in the course of their activities learned of said plans for the construction of two larger lakes to the south thereof, they thereupon wrongfully, illegally, maliciously and with a purpose of themselves acquiring said sites for dams and so constructing said toll road that no other save and except plaintiff could use the lands hereinabove described for the purpose outlined herein and for which said Nabob Oil Company contemplates using them, again shifted the course of the toll road." (Tr. 47)

(*d*) whether their land was being taken for a public use—

"Defendants allege that by reason of the circumstances hereinabove set forth, said Turnpike Authority, and the members thereof, in order to obtain funds to further the construction of said turnpike, at the special instance and direction of the aforesaid DeLeuw, Cather & Company, T. C. Fredericks, L. H. Cather, and H. E. Bailey entered into a plan and design to borrow approximately thirty-one million dollars from speculators, whose identity is to these defendants unknown,

but for whom said DeLeuw, Cather & Company, and L. H. Cather are trustees and agents; that by reason of control over all available moneys and finance of said Oklahoma Turnpike Authority said LeLeuw, Cather & Company, L. H. Cather, T. C. Fredericks, and H. E. Bailey do in fact dominate, control and exercise complete and absolute domination over all acts, powers and functions of said Oklahoma Turnpike Authority to such extent and in such manner that authorities and powers ostensibly vested by the laws of the State of Oklahoma in said Oklahoma Turnpike Authority and its members are in truth and fact the private acts of said DeLeuw, Cather & Company, L. H. Cather, T. C. Fredericks, and H. E. Bailey." (Tr. 46)

(*e*) calling attention to the unique and extraordinary value of their land for the proposed use above stated—

"These answering defendants aver and allege that the damages which Nabob Oil Company will sustain as the result of the wrongs herein complained of are of such a nature that it is impossible to compensate said Nabob Oil Company therefor in money damages; that in event compensation in money were possible, the amount of damages resulting from the wrongs herein complained of is so great that plaintiff is financially unable to pay and discharge same." (Tr. 49)

The foregoing issues were urged by Appellants throughout the proceedings and are the issues called to the attention of the Court herein.

September 20, 1951, an order was made appointing Commissioners to inspect land of Appellants, and to consider and appraise the injury and damage done to Appellants by the proposed taking, if carried out (Tr. 53-57).

October 1, 1951, such Commissioners filed their report

(Tr. 58-63) wherein Appellants' injury and damages were fixed at $5,163,250.00.

Hearing was held on several days on Appellee's objections to the Commissioner's report and on Appellants' answer filed September 20, 1951. The trial court's rulings on the portions of the evidence offered and excluded, and on the law of the right of Appellants to prosecute the challenges contained in their answer are shown (Tr. 64-107). In the course of the hearing the trial court treated Appellants' answer filed September 20, 1951, as an objection to the Commissioners' report (Tr. 87), and permitted O. O. Owens and Nabob Oil Company to file a pleading (Tr. 77-84) called "AMENDED RESPONSE OF O. O. OWENS AND NABOB OIL COMPANY, A CORPORATION, TO PLAINTIFF'S 'Objections to the Award of Commissioners; Motion to Set Aside and Vacate the Award and for the Appointment of New Commissioners,' and OBJECTIONS OR CROSS-PETITION OF SAID DEFENDANTS."

The trial court clearly and consistently ruled that its jurisdiction was limited to determining whether Appellee had taken more acreage than actually needed, and that any other issue was outside the scope of its jurisdiction.

> "By the Court: I am talking about reasonable necessity so far as the amount of the land involved and you are talking about the reasonable necessity for the purpose to which they intend to put it. As long as their resolution indicates the amount of land attempted to be taken by the resolution is no more than would be reasonably necessary to build a turnpike, such as this turnpike, across that strip of land, this court has no jurisdiction to alter that resolution of necessity. If they have abused their discretion, or have gone out of

bounds in determining which strip of land they will take, this court still has no jurisdiction to determine that question as long as the amount of land taken is reasonably necessary for the purpose and they are able to pay the damage for the land they take." (TR. P. 72)

This hearing resulted in a judgment (Tr. 115-126) wherein it is said (Tr. 120-121):

"* * * The Court holds that it is without jurisdiction, power, or authority to consider or determine any of the issues therein tendered which directly or indirectly involve the right, power or authority of the plaintiff to condemn property involved herein or the regularity of the proceedings set forth in plaintiff's Amended Petition under and whereby said power and authority is sought to be exercised by plaintiff, and further holds, adjudges, and determines that all questions respecting the constitutionality of the laws under which plaintiff is purporting to act here, have been heretofore determined by the Supreme Court of the State of Oklahoma adversely and contrary to the contentions of said defendants O. O. Owens and Nabob Oil Company, a corporation, by reason whereof this Court overrules and denies said contentions in their entirety, and sustains plaintiff's objections, to all of which said defendants named likewise object and except and exceptions are allowed."

In addition, the court vacated the award and appointed new Commissioners.

During the hearing on the objections to the Commissioners' report, after the trial court had consistently denied Appellants the right to present evidence on the issues raised, except to the limited extent indicated, the court likewise denied Appellants' motion in open court that the hearings be adjourned and continued until Appellants could apply

to the Supreme Court of Oklahoma "for review of these proceedings and a revision of the orders of the court respecting same." (Tr. 119)

Appellants thereupon filed in the Supreme Court of Oklahoma under Number 35327 their "Application to Assume Original Jurisdiction" (Tr. 1-3) and likewise their "Petition for Writ of Certiorari and for Writ of Prohibition" (Tr. 4-11) and this was denied (Tr. 12).

Appellants thereupon filed a motion for new trial (Tr. 109-114) wherein attention of the trial court was directed to the error involved in its rulings, orders and judgment on the issues herein presented. The motion for new trial was denied (Tr. 125).

Appellants thereupon prepared and filed in the Supreme Court of Oklahoma an appeal from the rulings, orders and judgment involved in all of the proceedings up to the appointment of the third commissioners. The petition in error (Tr. 144-152) raised Appellants' complaint of the rulings of the trial court on these issues. A case-made containing all of the pleadings, evidence and proceedings to that time was filed under No. 35435, portions of which were designated and included in the transcript. (13-126)

After appeal No. 35435 was filed and when it became apparent that the trial court was going to allow Appellee to dispossess Appellants from their property, Appellants filed in the appeal a petition of writ of Prohibition (Tr. 127-141), in which they recited the history of the proceedings and called attention to the issues they had tendered (paragraph VII, pp. 131-132; and paragraph XI, pp. 135-136) and sought a writ from the Supreme Court of the State of Oklahoma protecting them in their property rights until there could be adjudicated the contentions they were making

that Appellee did not possess the right and power of condemnation; that there was no necessity for the taking of Appellants' property; that said property was being condemned for private use and not a public use, and that Appellee had acted with malice, improper and fraudulent motives. This writ was denied the same day the application was filed (Tr. 142).

The District Court of Creek County thereupon made an order appointing a third board of commissioners to inspect Appellants' property and consider and appraise the injury and damage to them by the taking thereof. This board made only a cursory inspection of part only of the property and filed a report fixing the injury and damages at $40,000.00. This sum was the commissioners' estimate of the expense incurred by Nabob Oil Company in clearing the timber from the land being condemned.

The matter of compensation was then set for trial in the District Court of Creek County and was submitted to a jury. In the course of this trial the court adhered to its earlier rulings. On the issues of the right to condemn, the bad faith, malicious and fraudulent motives of Appellee, whether there was a necessity to take this land and whether Appellants' property was being taken for a public use, all evidence was excluded (Tr. 250-251) in this language:

> "By Mr. Young: If the Court please, at this time, we propose to offer the allegations of the cross-petition that this answer and cross-petition raised the questions I have indicated, and is a matter of which the Court will take notice.
>
> By the Court: I am not going into that question before the jury.
>
> By Mr. Young: Do we understand from Your

Honor that the offer of any evidence to support the allegations of the Answer and Cross-Petition, in so far as it involves the plaintiffs' right to condem, is excluded?

By the Court: The offer is denied, and the objections sustained."

On the issue of value, based on Appellants' assertion of their property's availability and adaptability for impounding water, the Court restricted the evidence to that of the value of these lakes for water flooding Nabob Oil Company's leases in the Milfay Pool only and rigidly excluded all evidence that attempted to show any value *for any other use*. Appellee admitted that Milfay Pool "is susceptible to water flooding and other repressuring methods." (Tr. 183) This left the issue of value to the jury to that limited extent, which made it impossible for the jury to conclude that there was any reason to build three dams and impound 100 million barrels of water to water flood 27% of one nearby oil pool.

Also, the trial court was in doubt whether only a part of a pool could be subjected to water repressuring. This doubt related to the possibility that if a part only of a pool could be flooded, the effect of injecting water into any part of a pool would be to flood and repressure all of the pool thereby giving the owners of the other 70% of the pool the benefit of Nabob Oil Company's flooding without cost to them. These reflections, if not actually suggestive to the jury, may have occurred to them naturally. This could affect their verdict. These matters caused the issue of value on this element to be submitted to the jury in a manner that made certain the value of this particular use would not be considered. The jury was undoubtedly entitled to hear evi-

dence and determine whether such an amount of impounded water would be usable for other purposes.

The decision of the trial judge to reject Appellants' evidence of the value of such possible uses of the water was summarily made not on the basis of the substantive law involved or on consideration of the weight and value of all of the evdence tendered, but on a momentary ruling with respect to the admissibility of one particular offer of evidence. Once the ruling was thus made, it was consistently adhered to thereafter.

On February 21, 1952, Journal Entry of Judgment was filed evidencing the various steps taken and the judgment of the court thereon in the hearing before the jury to fix compensation (Tr. 332-335) from which it appears that the jury's verdict fixed the Appellants' injury and damage at $23,400.00. The court directed judgment in favor of appellee for the return of the difference between the jury's verdict and the $40,000.00 award by the last board of commissioners.

Within due time Appellants filed a motion for new trial (Tr. 324-330). In Ground IV (Tr. 325), Ground VIII(g) (Tr. 327), and Ground VIII(w) (Tr. 329), the Appellants again expressly raised these constitutional issues. The District Court of Creek County heard this motion for new trial on February 18, 1952, and made order overruling and denying the same (Tr. 339).

On July 25, 1952, Appellants prepared and filed in the Supreme Court of the State of Oklahoma an Appeal from such judgment, the same being filed under No. 35632. The Petition in Error (Tr. 345-352) called these particular issues to the attention of the Supreme Court of the State of Oklahoma. In Assignments of Error Nos. 1 (Tr. 346), 4 (Tr.

347), 5 (Tr. 348), 8(g) (Tr. 349), and 8(w) (Tr. 352), the Appellants specifically raised these constitutional issues. In support of the various assignments of error made and in particular the ones relating to the constitutional issues, Appellants filed an extensive brief containing 446 pages. Appellants did not regard this brief as a part of the record in the matter and did not designate it to be included in the transcript. However, Appellants devoted many pages in the brief to discussing Propositions I and II regarding the denial of the right and power to condemn, the fraudulent motives of the condemnor, the denial to Appellants of due process of law and of uniform application and equal protection of the law as guaranteed by the constitutions of the United States and the State of Oklahoma and of the right to offer all their evidence of the highest adaptable use and value of their property thus being taken.

With the Appeal under number 35435 and the Appeal under number 35632, both pending before the Supreme Court of Oklahoma at the same time, and because they both arose out of the same matters, involved the same constitutional questions and, in fact were one and the same lawsuit, Appellants filed an application to consolidate the two appeals for hearing and decision. An order was made November 12, 1952, by the Supreme Court of the State of Oklahoma consolidating the cases (Tr. 143).

December 7, 1954, the Supreme Court of Oklahoma announced its decision in the consolidated cases, writing one opinion to dispose of the consolidated appeals, and the decision was filed in the Office of the Clerk of the Court on that date (Tr. 353-373). The Supreme Court of the State of Oklahoma barely noticed the questions raised and the

only reference thereto found in the opinion of the court (Tr. 356) is as follows:

> "Defendants' appeal pertains to both the question of the right to condemn and the question of the adequacy of the award and several contentions are advanced in connection with these questions.
>
> "In their first proposition, defendants contend that they were denied a forum in which to present the question of the reasonable necessity of taking the property involved in this siut. The record reveals, however, that defendants were heard at length by the trial court on several occasions and certainly were not denied a hearing or a forum."

This short and indifferent discussion of the issues presented by Appellants' Proposition No. 1 demonstrates the failure of the Supreme Court of Oklahoma to grasp the nature and scope of Appellants' contentions regarding their Constitutional rights.

Appellants' Proposition No. I as stated in their brief reads:

> "Where defendant condemnees challenge and deny condemnor's alleged and asserted need or necessity to condemn certain and specific property of defendants, and defendants allege and assert that condemnor, with ulterior motives, with sinister purposes and in conspiracy with others, seeks to despoil defendants of their property or to maliciously destroy it by fraudulently exercising the power of eminent domain and by unwarranted and arbitrary use and abuse of such power, denial to defendant condemnees of a forum in which to offer their evidence in support of their pleadings and allegations and to litigate the questions therein raised is denial of due process of law, of uniform application and equal protection of the law as guaranteed by the Constitutions of the United States and the State of Oklahoma."

With respect to Appellants' Proposition II which reads as follows:

> "Denial to defendant condemnees of the right and leave to offer all their evidence of highest adaptable use and value of all their property taken and damaged by condemnation and restricting condemnees' evidence of injury and damage to part only of such use, to part only and to the damaged parts or remnants of their property, and further denial to defendant condemnees of the right and leave to offer their evidence of the true and proper measure of damage sustained by condemnor's taking the particular property condemned is denial of due process of law, of uniform application and equal protection of the law as guaranteed by the Constitutions of the United States and the State of Oklahoma, and the trial court erred in denying such evidence, in restricting the evidence and in limiting the proper measure of damage to condemnees."

The court said in its opinion:

> "As the second proposition defendants contend that the trial court erred in denying defendants the right and leave to offer all their evidence of highest adaptable use and value of the property involved and in limiting the proper measure of damages to condemnees. Defendants' contention in regard to this proposition is somewhat difficult of ascertainment. We do not understand just how defendants could be said to have been denied the right to offer their evidence and we do not find anything in the record to indicate that they were so denied."

The right of way proposed to be taken by Appellee bisected Appellants' 2825-acre tract of land, and constitutes a strip varying from 200 feet to 400 feet in width and embraces in all 35 acres of land (Tr. 20-26). Appellants were consistent and persistent in the trial court and in the Su-

preme Court of Oklahoma in their reference to their damsites and lakesites No. 2 and No. 3, the destruction thereof by the location of the right of way as it was relocated, and the particular use and value which this land had for Appellants. The Supreme Court of Oklahoma never for an instant recognized the physical condition which made the property involved uniquely adapted for the purpose Nabob Oil Company was carrying out, as is evidenced by its statement on page 1 of its opinion as to the issues involved (Tr. 355), as follows:

> "This is an action in condemnation brought by Oklahoma Turnpike Authority, hereinafter referred to as Plaintiff, • • • concerning approximately 35 acres of rural land • • •."

When this Court considers how many efforts and on how many occasions and the variety of devices employed by which the Appellants sought to have the District Court of Creek County, Oklahoma, and the Supreme Court of the State of Oklahoma consider the injury and damage being done to them by the taking of the right of way along the route chosen, it is not understandable how the Supreme Court of Oklahoma failed to recognize the Constitutional issues raised in Appellants' Propositions No. I and No. II. The statement of the Supreme Court of Oklahoma in its opinion to the effect that Appellants were heard on several occasions and at length by the trial court demonstrates again the lack of understanding on the part of the Supreme Court of Oklahoma as to the nature of the issues presented to the trial court and the effect of its rulings thereon.

An example of how the Supreme Court of Oklahoma misconstrued the constitutional issues presented by Appellants in Proposition No. II may be found in the statement (Tr. 360), to-wit:

"We do not understand just how defendants could be said to have been denied the right to offer their evidence and we do not find anything in the record to indicate that they were so denied."

This statement of the Supreme Court of Oklahoma clearly overlooks the following statement by the trial court, in sustaining an objection to an offer of evidence on the issue (Tr. 65):

"The Court: * * * So far as the court is concerned the other pools are too remote to enhance the value at this time of this particular piece of property."

Another instance is found (Tr. 218-219) when the trial court sustained an objection to another offer of evidence on this issue:

"By Mr. Young: Let the record show that we offer to show by this witness, if he were permitted to answer, that Nabob Oil Company owns leases with potential oil reserves in the immediate vicinity, contiguous to the property involved in this law *law* suit, which would produce great quantities of oil, if an available water supply for repressuring were present, which could not otherwise be produced and that the value of this oil that is recoverable only through the use of repressuring methods runs into many millions of dollars."

In sustaining an objection to this offer the trial court said:

"By the Court: I do, so long as it is not material in arriving at the value; there isn't anything here that indicates to me that the mineral rights are going to be disturbed."

The extent of the misconception on the part of the Supreme Court of Oklahoma of Appellants' contentions is further illustrated by the language on page 361 of the Tran-

script regarding the form and contents of Appellants' brief. The constitutional rights repeatedly put forward by Appellants and rejected by the trial court and misconceived by the Supreme Court of Oklahoma should not have been judged on whether the trial court erred in ruling on evidence tendered on a justiciable issue, but must be judged on the basis of the trial court excluding the issues and all evidence tendered thereon.

Within due time Appellants filed a Petition for Rehearing (Tr. 374-381). In their Petition for Rehearing Appellants called the attention of the Supreme Court of Oklahoma to the errors manifested in its opinion with regard to these particular issues. On May 3, 1955, the Supreme Court of Oklahoma entered an order denying the Petition for Rehearing (Tr. 382).

July 29, 1955, Appellants filed in the Supreme Court of Oklahoma, in the Office of the Clerk, their "Notice of Appeal to the Supreme Court of the United States," (Tr. 383-393) and correction thereof September 6, 1955 (Tr. 394-396).

It cannot seriously be questioned that Appellants did not raise these constitutional issues timely and at every appropriate opportunity, and the contention cannot be made that they were not in proper form or phrasing. The Supreme Court of Oklahoma acknowledged that the contentions were made although it did not discuss them (Tr. 356). Nevertheless, since it affirmed the trial court's judgment which it could not have done had it sustained appellants' contentions, the necessary implication is that these contentions were denied. *N. Y., ex rel. Bryant,* v. *Zimmerman,* 278 U. S. 63, 67.

There is nothing in Section 658 that implies the interpretation and application that the Supreme Court of Okla-

homa has given it in this case. There is nothing in Sections 53 or 46 which the court has before or since construed as it did Section 658 in this case. *Wrightsman* v. *Southwestern Natural Gas Co.*, 173 Okl. 75, 46 P. 2d 925; *Town of Ames* v. *Wybrant*, 203 Okl. 307, 220 P. 2. 693; *Seba* v. *Independent School District*, (Okla.) 253 P. 2d 559; *Graham* v. *City of Tulsa*, (Okla.) 261 P. 2d 893. As construed and applied in this case Section 658 is unconstitutional because it offends against the XIV Amendment to the Constitution of the United States. As interpreted and applied, Section 658 violates the XIV Amendment in regard to due process of law, the taking of property without just compensation, and the denial of the equal protection of the laws.

The interpretation and application of Section 658 as has been applied in this case had more far reaching effect than its application to Appellants alone because it applies to all others whose property is being taken or which may be taken by appellee. This is true because it gives appellee a position of immunity from the constitutional defenses to which other condemnors are subject, and which are guaranteed to all property owners.

Appellants have stated the case to the extent set out to acquaint the Court with the case, and for the further reason to show that the constitutional issues were timely raised. *Hulburt* v. *City of Chicago*, 202 U. S. 275. The procedure in Oklahoma obliges a litigant to raise the constitutional issue in the trial court, *Bagwell* v. *Finch*, 194 Okl. 416, 152 P. 2d 114, although in cases of public interest the Supreme Court of Oklahoma may consider the issue on appeal for the first time. *First National Bank of Alex* v. *Southland*, 189 Okl. 9, 112 P. 2d 1087. Appellants are clearly within the *Bagwell* v. *Finch* rule.

The direct result of the decision of the Supreme Court of Oklahoma in this case was to allow Appellants' property to be taken by Appellee, and Appellants dispossessed therefrom (Tr. 336-337) all the while denying Appellants the constitutional right to contest the taking on the several defenses they advanced.

Another direct result of the decision of the Supreme Court of Oklahoma in this case was to deprive Appellants of their property without just compensation because Appellants were denied at all times the right to show all of the uses for which their property was available and adaptable, and to which it might be applied by a prudent owner with adequate means within the reasonably near future. See *Grand Hydro* v. *G. R. D. A.*, 192 Okl. 693, 139 P. 2d 798, reversing; *G. R. D. A.* v. *Grand Hydro*, 200 Okl. 159, 201 P. 2d 225, affirmed *G. R. D. A.* v. *Grand Hydro*, 335 U. S. 359; *United States* v. *Chandler-Dunbar Water Power Company*, 229 U. S. 53, and *United States, ex rel. T. V. A.*, v. *Powelson*, 319 U. S. 266.

Another direct result of the decision of the Supreme Court of Oklahoma in this case was to deny Appellants the equal protection of the law in that the right to show special defenses was denied to Appellants. Prior to the enactment of Section 658 (as the law of eminent domain had been applied in takings by railroads and for state highways) all other property owners were allowed to show such defenses. *Wrightsman* v. *Southwestern Natural Gas Company*, 173 Okl. 75, 46 P. 2d 925, and *Town of Ames* v. *Wybrant*, 203 Okl. 307, 220 P. 2d 693. The same is true since for property owners and condemnors other than the parties to this action. *Seba* v. *Independent School District*, (Okla.) 253 P. 2d 559, and *Graham* v. *City of Tulsa*, (Okla.) 261 P. 2d

893. Thus it clearly appears that in all earlier and later cases the law of Oklahoma, conformable to federal constitutional requirements, has treated the right and power to condemn, the necessity to condemn the particular property, the bad faith motives of condemnor and whether the property was being taken for a public use as judicial questions, open to the property owner as grounds of defense. The law particularly required these defenses to be adjudicated before compensation could be determined and the owners dispossessed. Also the rule of law as to evidence of value on the basis of actual use and prospective use, as to all other property owners than Appellants, has remained the same. The rule in the *Grand-Hydro* decisions was and is the law, except as to Appellants, unchanged and unmodified.

Statement of the Grounds Upon Which It Is Contended the Federal Questions Involved Are Substantial.

(1) The decision of the Supreme Court of Oklahoma approving the taking of Appellants' property was made without permitting Appellant to defend against the right and power to take the property, the necessity for taking the property, the bad faith motives of the condemnor and whether the property was to be taken for a public use. These issues were entirely excluded from consideration. The decision, therefore, is invalid and deprives appellants of their property without due process of law, contrary to the XIV Amendment. *Rees* v. *Watertown,* 19 Wall. 107.

It is not open to further question that the Supreme Court of the United States may examine proceedings had in a state court, under state authority, for the appropriation of private property to public purposes to determine whether the state court prescribed any rule of law in dis-

regard of the owners' federal constitutional rights. *A. Backus, Jr., & Sons* v. *Fort Street Union Depot Co.*, 169 U. S. 557; *United States, ex rel T. V. A.*. v. *Welch*, 327 U. S. 546.

(2) The proceedings were instituted by Appellee for the purpose of taking a right of way across Appellants' property the admitted effect of which was to prevent Appellants carrying on their plans. The trial court permitted Appellants to prove that their property could be utilized for the storage of vast quantities of water. Appellee admitted that the Milfay Pool could be repressured by water flooding. Nevertheless the trial court would not let Appellants introduce evidence of the other facts that gave any significance or value to these proved and admitted facts. Likewise, leaving these two facts unrelated to any other facts, there was no opportunity to consider the combination of these facts with other facts as they affected the value of Appellants' property for all possible uses.

Therefore, there was no evidence admitted to show whether there was any value attaching to the opportunity to sell water to other lease operators in the Milfay Pool. The evidence to prove that nearby pools were susceptible of repressuring by waterflooding was excluded. There was no evidence admitted to show the value attaching to the use of this water by Nabob Oil Company to repressure its wells in nearby pools. And no evidence was admitted to show the value attaching to the opportunity to sell water to other lease operators in the nearby pools. All evidence relating to nearby pools and portions of the Milfay Pool owned by other persons was excluded. Appellants' evidence, if it had been admitted on these points, would clearly have established the feasibility of Appellants' plans to use this property and the value of the property when so used. The jury

could then have taken these facts into consideration. The refusal to allow this evidence to be admitted simply removed from the case a most substantial part of the value of Appellants' property.

The number of barrels of oil and the value thereof that could have been recovered from the Milfay Pool alone ran into the millions, and when it is considered that the repressuring of Nabob Oil Company's producing properties in nearby pools would have produced results on a comparative scale and, likewise, with respect to all or some part of the 42 nearby pools, the Court will realize that the monetary value of Appellants' rights was not insignificant.

The decision of the Supreme Court of Oklahoma approving the taking of Appellants' property without allowing Appellants to introduce evidence of its availability and adaptability for possible uses when Appellants were seeking to make such showing results in depriving Appellants of their property without just compensation. The rule of law in Oklahoma governing the ascertainment of value in other cases similar to this case permitted such evidence to be introduced. *Grand Hydro* v. *G. R. D. A.*, 192 Okl. 693, 139 P. 2d 798. The taking of Appellants' property for a value fixed without considering the possibility of its use for all purposes, present and prospective, for which it is adapted, is a violation of the XIV Amendment. *G. R. D. A.* v. *Grand Hydro,* 335 U. S. 359, 367.

The federal constitutional provision that no state may deprive a person of his property without just compensation is one that cannot be evaded nor impaired by any form of legislation. *B. O. Railroad Company* v. *United States,* 298 U. S. 349. This is a rule of law upon which Appellants relied in this case. Therefore, when the Supreme Court of

Oklahoma construed and applied Section 658 as it did when Appellants were contending all the time that such a construction and application was contrary to their rights under the XIV Amendment, as established by all prior decisions, the decision reached was and is invalid because it offends against the XIV Amendment.

(3) The decision of the Supreme Court of Oklahoma approving the taking of Appellants' property without applying to them the laws always applied to others in similar situations in Oklahoma is invalid, and violatve of Appellants' rights under the XIV Amendment. The decision construes Section 658 in a manner to set up two classes of condemnors and two classes of condemnees in Oklahoma. Classification is not *per se* forbidden, but classification based upon arbitrary distinctions is forbidden. The rule of law necessarily resulting from the decision complained of permits Appellee to take the property of Appellants and others without being subject to the defenses of law and fact that can be raised against other condemnors, and permits Appellee to take the property of Appellants for a compensation measured by different considerations than govern the fixing of compensation for other property owners and therefore is a clear denial of Appellants' rights. Appellants must be permitted to make the same defenses against the taking of their property by Appellee that other property owners are permitted under Sections 53 and 46. The value of Appellants' property must be ascertained by the same rules that govern in the taking of similar property of other condemnees under Sections 53 and 46.

(4) Unlike the situation in the case of *Rindge Co.* v. *Los Angeles County,* 262 U. S. 700, the Legislature of Oklahoma in enacting Section 658 did not foreclose the courts

from deciding the judicial questions involved in the taking of property by eminent domain for Appellee's purposes. Our situation is like that in *Milheim* v. *Moffatt Tunnel Improvement District,* 262 U. S. 710, where the Legislature left the issues open for judicial determination.

Since the Legislature did not foreclose these issues, the foreclosing of these issues to Appellants as defenses to the taking of their property arises from the construction which the Supreme Court of Oklahoma has placed on Section 658. This was done in the face of Appellants' assertion of their rights under the XIV Amendment. Therefore, the Appellants have been deprived of their property contrary to their rights under the XIV Amendment by reason of the decision of the Supreme Court of Oklahoma complained of herein.

(5) Appellants repeatedly called to the attention of the Supreme Court of Oklahoma the fact that Appellee in its answer brief admitted that Appellants had raised these issues in the trial court and they had not been adjudicated. We quote from Appellee's brief, pages 110-111, as follows:

> "All condemnation cases present two basic questions: *First,* the right to condemn; *second,* the amount of compensation to be paid for the property involved. The amount of compensation cannot be tried to a jury until after the right to condemn has been established.
>
> "The right to condemn or the lack of the power can be presented to the court only in the form of exceptions to the Commissioners' report. Owens, Nabob, *et al.,* have questioned the right of the Turnpike to condemn this property at each step of the proceedings.
>
> "In the Answer filed by Owens and Nabob (C-m. 2, 29) it is asserted that it is not necessary for the Turnpike to condemn any portion of the land described

in its Petition; the power to condemn the land for the purposes set forth in the Petition is denied; that the construction of the Turnpike is for private gain and not public use; that the authority granted to the Turnpike has been used arbitrarily and capriciously, and therein it is asked that the proceedings be quashed and that injunction issue barring the Turnpike Authority from interfering with the possession of Nabob's property.

"That right had never been admitted, nor had it been adjudicated by the trial court. In *Town v. Ames* v. *Wybrant*, 203 Okl. 307, 220 P. 2d 693, this Court said:

> 'Therefore, the establishment of the right to condemn is a prerequisite to any right of possession by the condemnor.'

and referring to the case of *Wrightsman* v. *Southwestern Natural Gas Co., supra,* the Court in the *Wybrant* case continues:

> 'Therein we expressly held that the landowner is entitled to challenge in the condemnation proceeding the right to condemn and have that question judicially determined prior to the final determination of the award for compensation and damages. * * *'"

Conclusion.

Wherefore, Appellants respectfully submit that this Court has jurisdiction of this appeal under Section 1257(2), that its jurisdiction has been timely and properly invoked, that the issues presented involve substantial federal rights of Appellants which have been denied them by the courts of Oklahoma, and this Court should, upon full consideration of the matter, reverse the decision of the Supreme Court of Oklahoma and remand the action with instruc-

tions to allow Appellants their constitutional rights in keeping with the settled law under both the Federal and State Constitutions.

Respectfully submitted,

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PROOF OF SERVICE.

I, ..., a .....
....., for Appellants herein, depose and say, that I served a copy of the foregoing jurisdictional statement in connection with the appeal to the Supreme Court of the United States by Appellants herein, by delivering same to ..... in the offices of Mr. Leon Shipp, of Robinson, Shipp, Robertson & Barnes, Hightower Bldg., Oklahoma City, Oklahoma, and by delivering the same to ....., in the offices of Mr. Don Welch, Jr., First National Bldg., Oklahoma City, Oklahoma, they being the attorneys for Appellee herein.

.....,

Subscribed and sworn to before me this ... day of September, 1955.

.....,
Notary Pubic.

My commission expires:

.....

APPENDIX

(Opinion of the Supreme Court of Oklahoma, *In re* C. E. Owens, et al., *vs.* Oklahoma Turnpike Authority, Nos. 35435 and 35632; filed Dec. 7, 1954.)

(Filed in Supreme Court of Oklahoma, Dec. 7, 1954; Andy Payne, Clerk.)

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Nos. 35,435 & 35,632

C. E. Owens, Mrs. C. E. Owens, O. O. Owens and Nabob Oil Company, Plaintiffs in Error,

vs.

Oklahoma Turnpike Authority, Defendant in Error.

SYLLABUS

1. An order setting aside the report of commissioners in condemnation proceedings, and directing a new appraisement is interlocutory and not final, and an appeal will not lie therefrom.

2. When the Oklahoma Turnpike Authority has selected and designated a route for the construction of a turnpike lawfully authorized to be built, the courts of the state will not inquire into the matter for the purpose of determining why some other route was not chosen.

3. The extent of the range of inquiry to be permitted regarding the value of the property taken or damaged in eminent domain proceedings is largely in the discretion of the trial court, and the action of the trial court in admitting or excluding evidence as to value will not be disturbed unless there has been an abuse of such discretion.

[OPINION.]

Appeal from the District Court of Creek County, Oklahoma, Hon. Kenneth Hughes, Judge.

Action to acquire property by condemnation brought by Oklahoma Turnpike Authority against C. E. Owens, et al. From an order setting aside report of commissioners and directing a new appraisement, defendants appeal in cause No. 35,435. From a jury verdict resulting in a decrease of amount of commissioners' award, defendants appeal in cause No. 35,632.

Appeal in cause No. 35,435 dismissed.

Judgment in cause No. 35,632 affirmed.

Young, Young & Young, Sapulpa, Oklahoma, and O. O. Owens, per se, Tulsa, Oklahoma, For Plaintiffs in Error;

Robinson, Shipp, Robertson & Barnes, Oklahoma City, Oklahoma, For Defendant in Error.

Of Counsel: Leon Shipp, Wm. L. Robertson, Oklahoma City, Oklahoma.

Williams, J.,

This is an action in condemnation brought by Oklahoma Turnpike Authority hereinafter referred to as plaintiff, against C. E. Owens, Mrs. C. E. Owens, O. O. Owens and Nabob Oil Company, hereinafter referred to as defendants, concerning approximately 35 acres of rural land situated in Creek County, Oklahoma, taken by plaintiff for construction of the Turner Turnpike. Three different Boards of Commissioners were appointed and filed their reports. The report and award of the first such board, in the amount of $3,170.00, was vacated by the trial court for the reason that two of the defendants were not parties to the action at the time of the appointment. The second such board was appointed and filed a report assessing the award to be paid to defendants at $5,163,250.00. Plaintiff filed a motion to vacate such award and for appointment of new commission-

ers, which was sustained by the trial court and a third such board was appointed. Defendants have appealed from this action of the court in cause No. 35,435. Such appeal must be dismissed, however, since it is an attempt to appeal from an interlocutory order. We *we* said in the syllabus in the case of City of Eufaula v. Ahrens, 58 Okl. 180, 159 P. 327.

> "An order setting aside the report of Commissioners appointed to view the property and assess damages sustained by property owners in condemnation proceedings, and directing a new appraisement is interlocutory and not final, and an appeal will not lie therefrom."

The third Board of Commissioners filed a report assessing the compensation to be paid defendants at $40,000. Defendants filed a motion to vacate the third award, which was overruled, the award was confirmed and the matter set for trial by jury on the amount of the compensation. The jury trial resulted in a verdict fixing the compensation at $23,500.00. Judgment was rendered for plaintiff in the amount of $16,600.00, the difference between the amount of the commissioner's award previously paid into court and the jury's verdict, and defendants' appeal from that judgment in cause No. 35,632. Defendants' appeal pertains to both the question of the right to condemn and the question of the adequacy of the award, and several contentions are advanced in connection with these questions.

In their first proposition, defendants contend that they were denied a forum in which to present the question of the reasonable necessity of taking the property involved in this proceeding. The record reveals, however, that defendants were heard at length by the trial court on several occasions and certainly were not denied a hearing or a forum. The real basis for defendants' complaint seems to be the action of the trial court in excluding certain evidence offered by defendants. Defendants say that the court's refusal of this offer of evidence constituted a denial of a hearing and of due process. A review of the record reveals that the excluded evidence pertained to the availability of another

route for the construction of the turnpike in lieu of the one chosen. The trial court quite properly refused to admit such evidence. Defendants did not contend that the amount of land sought to be condemned was excessive nor did they raise any issue as to the character of the use to which the property sought is to be subjected. Defendants merely contended that the route selected for the turnpike could have been changed in such a manner as to entirely miss the property herein involved and require the use of other property instead. They, in fact, asked the trial court to require plaintiff to change the route of the turnpike to one selected by defendants. The trial court properly refused such request, and excluded the evidence offered by defendants pertaining to the availability and desirability of a route other than the one selected by the Turnpike Authority. In this the court did not err. The same question was before this court in the case of Bilby v. District Court of Ninth Judicial District, 159 Okl. 268, 15 P. 2d 38, wherein we said in the body of the opinion therein:

> "The first statement made in their brief is: 'The land owners demanded the right to show that there was no necessity for condemning the right of way for the reason that there was a section line paralleling the land sought to be condemned and that the owners had offered to give the land on the section line to the State with any additional land necessary on either side of the section line which the state might require to be used as a road.'
>
> "The rule is well settled in this state and most other that the question of necessity in such cases is not a judicial question, but is for the Legislature. Arthur v. Choctaw County Comm'rs, 43 Okl. 174, 141 P. 1; State, ex rel. Dabney, Attorney General, v. Johnson, 122 Okl. 241, 254 P. 61; Hennen v. State, ex rel. Short, Atty. Gen., 131 Okl. 29, 26 P. 636."

And also in the opinion in the case of City of Tulsa v. Williams, 100 Okl. 116, 227 P. 876, we said:

"There is no doubt that the law of eminent domain authorizes the petitioner to fix the situs of its water reservoir. It is entitled to a water supply, and has a right to procure it from any available source. When the city government has chosen the situs for a reservoir, the courts of the state will not inquire into the matter for the purpose of demanding why some other situs was not chosen."

The same rule is applicable here. Where the Oklahoma Turnpike Authority has selected and designated a route for the construction of a turnpike lawfully authorized to be built, the courts of this state will not inquire into the matter for the purpose of demanding why some other route was not chosen.

As their second proposition, defendants contend that the trial court erred in denying defendants the right and leave to offer all their evidence of highest adaptable use and value of the property involved and in limiting the proper measure of damage to condemnees. Defendants' contention in regard to this proposition is somewhat difficult of ascertainment. We do not understand just how defendants could be said to have been denied the right to offer their evidence and we do not find anything in the record to indicate that they were so denied. We conclude that defendants' contention must be directed toward the correctness of the court's ruling on the admissibility of the testimony offered by them. In argument in support of this proposition, defendants state in their brief:

"The trial court persistently denied defendants the right and leave to offer their all expert testimony of the destructive effect of constructing the toll road, * * *"

and also state:

"The trial court throughout the jury trial arbitrarily sustained Turnpike's many objections to defendants' introducing competent evidence showing the

highest adaptable use of defendants' property and project as a unit."

Fairly similar argument is dealt with in our treatment of the second portion of defendants' fifth proposition. Moreover, we do not consider that the portion of defendants' brief dealing with this proposition complies with rule 15 of this court insofar as such rule provides:

> "Where a party complains of the admission or rejection of testimony, he shall set out in his brief the testimony to the admission or rejection of which he complains, stating specifically his objections thereto."

We therefore decline the invitation to search the record in order to discover each instance in which the trial court sustained an objection and then determined whether each such ruling was correct or erroneous. Furthermore, we are committed to the rule that the extent of the range of inquiry to be permitted regarding the value of the property taken or damaged in eminent domain proceedings is largely in the discretion of the trial court, and the action of the trial court in admitting or excluding evidence as to value will not be disturbed unless there has been an abuse of such discretion. City of Tulsa v. Horwitz, 131 Okl. 63, 267 P. 852; State, ex rel. City of Ardmore, v. Winters, 195 Okl. 243, 156 P. 2d 798; City of Enid v. Moyers, 196 Okl. 470, 165 P. 2d 818. We have reviewed the lengthy record of trial in this case and are of the opinion that there was no abuse of such discretion here.

Defendants' third proposition of error is stated by them as follows:

> "Where a duly appointed and qualified Board of Commissioners in a condemnation proceeding has appraised condemnees' property, has filed its report awarding compensation and damages as directed by the order of the court, and, after condemnor has filed exceptions and objections thereto and motion to vacate such report, both condemnor and condemnees have appealed from the award and demanded a jury trial, the

court is without jurisdiction and authority to ignore the demands for jury trial and to sustain condemnor's previously filed motion to vacate; and the judge is also without jurisdiction and authority to appoint and instruct a 'new' Board of Commissioners; and the court erred in sustaining condemnor's motion and as trial judge erred in appointing and instructing the 'new' commissioners without any legal reason—and the court erred in confirming the 'new' Commissioners' Report."

We find no merit in such proposition for several reasons. In the first place, the trial court did not ignore the demands for a jury trial. On the contrary, the record reveals that the trial court acceded to the demands for a jury trial and set the case for trial on the jury docket at the earliest possible date, such jury trial was actually had and this appeal is prosecuted therefrom. The record further reveals that the only parties objecting to such jury trial or attempting to prevent the same were the defendants. Defendants will not now therefore be heard to complain that they were denied a jury trial. The rest of defendants' third proposition we regard as immaterial and moot. Since the Commissioners' award was superseded by the jury verdict, it is of no moment whether the court erred in appointing and instructing the new commissioners or not.

In their fourth proposition defendants contend that the court erred in refusing to vacate the last commissioners' award. We note that in this proposition defendants contend that the trial court should have done the very thing which they contend in their third proposition the court had no jurisdiction or authority to do. We regard the answer as being the same in both instances, however. Since the jury verdict superseded the commissioners' award, the question of the correctness of the commissioners' award has become immaterial and moot.

Defendants' fifth proposition concerns a number of alleged errors lumped together under one proposition. Their first contention under this proposition is that certain re-

marks of the trial court in rebuking counsel prevented a fair trial. This contention is based on three different incidents which occurred during the progress of the trial. In the first incident the trial judge made the following remark:

> "I will sustain that objection to that, without the making of an objection. That is about the fourth time you asked the same question. I don't want you to do it any more."

In the second incident the remark of the trial court concerning which complaint is made was:

> "I don't want to know the description and don't argue that before the jury."

In the third incident complained of the record reveals that after counsel for defendants attempted to argue with the court the trial judge made the following statement:

> "Don't argue with me, Mr. Young. I don't want any back lip out of you. I don't want any argument from counsel in front of the jury."

Defendants demanded a mistrial after each of the above mentioned incidents, which was denied on each occasion, and now contend that as a result they were deprived of a fair trial. We find no merit in such contention. Defendants cite as authority for their contention the line of cases holding that the trial judge should refrain from commenting on, or indicating an opinion in the presence of the jury as to the merits of the case or the truth or falsity of the testimony, such as Settle v. Crawford, 155 Okl. 291, 9 P. 2d 38; Central Fire Ins. Co. of Baltimore v. Smith, 188 Okl. 203, 107 P. 2d 361, and other cases of a similar nature. We find no fault with the cases cited, except that they are not applicable here. There is nothing in the remarks of the trial judge above quoted which indicates a preference for one or the other of the litigants, or includes an expression of opinion upon the merits of the controversy or an opinion concerning the truth or falsity of the testimony presented

to the jury. While the last quoted remark of the trial judge may not have been in the best of taste, there is nothing in it or the other quoted remarks, which materially affected the substantial rights of defendants. As we said in the case of Empire Oil & Refining Co. v. Fields, 188 Okl. 666, 112 P. 2d 395,

> "Improprieties or irregularities in the conduct of a judge are fatal, however, only where there is such departure from proper and orderly method of disposing of the action that the substantial rights of a party are materially affected. The manner of emphasis or force of expression of a judge that cannot be reasonably interpreted to express a wrong opinion as to the law or facts, or to express an opinion of a fact which should be left wholly to the jury, cannot be assigned as error, so mere decisiveness or abruptness of manner is not necessarily objectionable, nor is impatience, discourtesy, or bad manners, provided the essentials of sound judicial conduct are not violated, and complaint cannot ordinarily be made of the tone of voice used by the judge, unless some actual error is committed. 64 C. J. 102, Sec. 107. See also 26 R. C. L. 1028, Sec. 29."

As a further part of the same proposition, defendants assert that all evidence material to the issue must be admitted and then state that the case-made is replete with instances of the trial court's excluding competent testimony. This is in effect a repetition of defendants' second proposition, hereinabove disposed of. It is further stated in this proposition that the court sustained 205 objections made by plaintiff to testimony offered by defendants. A review of the record reveals that many of the objections were sustained on the grounds that the particular witness was not shown to be qualified to answer the particular question, and others were sustained on the grounds that the question called for a conclusion on the part of witness. No where in the briefs do defendants demonstrate the incorrectness of such rulings on the grounds given and we find no error therein. Still other objections were sustained on the grounds

of incompetency, irrelevancy or immateriality, and a review of the record reveals that in most of such instances the trial court's ruling was correct. As previously stated, we find no such abuse of discretion on the part of the trial court in its rulings as would require reversal of the cause.

As a still further part of their fifth proposition defendants state that guess work and conjectural or hearsay testimony of incompetent witnesses must be excluded. They then argue that a careful study of the testimony of all three expert witnesses for plaintiff shows each witness' testimony as to value and damages was based on hearsay testimony supplied them by others, and not on personal knowledge based on inspection of the property and that such testimony should have been stricken as hearsay.

It should first be noted that although defendants now contend that the testimony of three witnesses should have been stricken, the record reveals that defendants only moved to strike the testimony of the witnesses Swan and Grant at the trial of the case. We will therefore limit our consideration to the correctness of the court's ruling in refusing to strike the testimony of the witnesses Swan and Grant.

The record reveals that these two witnesses are qualified real estate experts and that their testimony concerned their opinions as to the value of the land in controversy. Defendants' complaint as to their testimony apparently goes to the fact that they were asked some questions in which they were required to assume a certain state of facts to be true and to give an opinion accordingly and in other questions they were asked if they had heard certain testimony given by other witnesses concerning certain matters in controversy and upon answering that they had, were then asked to state their opinion as to the value of the land based on the information gained from the testimony of the other witnesses. Defendants say that these witnesses' testimony was therefore based on hearsay and should be excluded. If it be conceded that the testimony of these two experts was based at least partially on hearsay, still it does

not necessarily follow that such testimony was inadmissible. Strictly speaking, practically all expert testimony is based at least in part upon hearsay. We have previously held that it is proper to ask an expert witness a hypothetical question based on other evidence in the case and that it is also proper to outline to an expert witness the testimony of other witnesses for the purpose of basing a hypothetical question thereon. De Camp v. Comerford, 134 Okl. 145, 272 P. 475; Shawnee Gas & Electric Co. v. Hunt, 32 Okl. 261, 122 P. 673. An expert witness may also be asked for an opinion based upon the assumption that testimony given by other witnesses is true. Colley v. Sapp, 44 Okl. 16, 142 P. 989, and see also the annotation at 82 A. L. R. 1460. Almost the identical question was before the United States Court of Appeals for the Tenth Circuit in the case of H. & H. Supply Co. v. United States, 194 F. 2d 553, wherein the court said:

> "It may be conceded, as contended, that both Dooley and Sidwell relied in part upon hearsay sources in reaching their conclusions as to value, but this does not make their testimony as to value inadmissible. The rule is well established that an expert may testify as to value, though his conclusions are based in part, or even entirely, upon hearsay evidence."

We therefore conclude that the court did not err in refusing to strike the testimony of the two expert witnesses.

Defendants' final contention is that plaintiff's petition is fatally defective because it seeks to condemn certain "temporary grants for the purpose of opening stream channels." Defendants' chief complaint in this regard seems to be that the petition fails to state the length of time for which such temporary grant is to be taken. It is quite clear from plaintiff's petition that it was necessary in connection with the construction of the turnpike to go on to certain lands belonging to defendants and open certain stream channels. The land on which it was necessary to open such stream channels is specifically and accurately described by

metes and bounds and is also platted on a map attached to the petition. There is left no room for doubt as to exactly what plaintiff proposes to do and where it proposes to do it. We regard that as being all the information necessary in order to enable the parties to litigate the question of how much plaintiff shall be required to pay defendants for the right to open such stream channels. If, as defendants contend, it is necessary to know the length of time that will be required to open such stream channels in order to determine the value of such right, then reference may be had to the construction contract which was introduced in evidence and which indicated that the contractor had agreed to complete the work within 150 working days. Obviously this is all the information plaintiff could possibly give in this connection. To require more would be to require the physically impossible. We are of the opinion and hold that plaintiff's petition is sufficient under the circumstances and that the court did not err in overruling defendants' motion to dismiss it.

Judgment affirmed.

November 15, 1954

MEMORANDUM

On the 8th day of November, 1954, the Supreme Court went on record as opposing the granting of any additional time in which to file petitions for rehearings, other than allowed by the rules of the Court, due to the fact that there will be a change in the Court on the second Monday in January. The Court wants to dispose of all cases in which opinions have been adopted before that date.

HARRY L. S. HALLEY,
Chief Justice.

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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1955.

No. 415

C. E. OWENS, MRS. C. E. OWENS, O. O. OWENS and NABOB OIL COMPANY, *Appellants,*

vs.

OKLAHOMA TURNPIKE AUTHORITY, *Appellee.*

PETITION *for* REHEARING.

Comes now C. E. Owens, Mrs. C. E. Owens, O. O. Owens and Nabob Oil Company, appellants above named, and present this, their petition for rehearing of the above entitled cause, with respect to the decision of November 14, 1955, and in support thereof, respectfully show:

1. The Court failed to observe the presence of a substantial Federal question in the jurisdictional statement, as supplemented by the designated portions of the record included in the transcript.

2. The Court erred in failing to reverse the final judgment of the Oklahoma court for deciding appellants' substantive rights under the Federal Constitution on procedural basis. Substantial Federal Questions are presented in the appeal arising from the refusal of the Oklahoma court to proceed in such manner that all of appellants' substantial rights under controlling Federal law would be protected.

3. The issues presented are not ones that involve the correctness of the trial court's ruling on the weight of the evidence. The issues presented to this Court in-

volve a final judgment of the Oklahoma court refusing to allow evidence to be introduced.

There is too much substance involved in this matter in the nature of legal principles and in material substance to accept the Court's decision without an earnest effort to procure the withdrawal thereof and the further consideration of the appeal on the merits.

Since the Court in *A. Backus & Son* v. *Fort Street Union Depot Company,* 169 U. S. 557, said:

> "It is also not open to further debate, since the decision in *Chicago, Burlington & Q. R. R. Co.* v. *Chicago,* 166 U. S. 226 (41:979), that this court may examine proceedings had in a state court, under state authority, for the appropriation of private property to public purposes, so far as to inquire whether that court prescribed any rule of law in disregard of the owner's right to just compensation. But in this respect we quote the restriction placed in the opinion then filed (p. 246 (41:988)):
>
> > 'We say, "in absolute disregard of the company's right to just compensation," because we do not wish to be understood as holding that every order or ruling of the state court in a case like this may be reviewed here, notwithstanding our jurisdiction, for some purposes, is beyond question. Many matters may occur in the progress of such cases that do not necessarily involve, in any substantial sense, the Federal right alleged to have been denied; and in respect of such matters, that which is done or omitted to be done by the state court may constitute only error in the administration of the law under which the proceedings were instituted.'
>
> While in cases of this kind coming from the Supreme Court of a state, questions of fact passed upon in the state courts are not here open to review (*Egan* v. *Hart,*

> 165 U. S. 188 (41:680), and *cases cited in the opinion), it may not be inappropriate to notice that the award of compensation as finally sustained gave to the respondents the sum of $63,000. As the valuation they placed upon the plant, outside of the realty, was only $150,000, and of the realty the like sum of $150,000, though the realty cost in 1871 less than $30,000, and as none of the ground upon which the plant stood and the business was carried on was taken by the Depot Company, but only the use of the street in front thereof, and that not so as to exclude them from its use, it is obvious that the award, whether adequate or not, was not one in reckless disregard of their rights,"

it has never been doubted that this Court has jurisdiction of the issues presented. We observe three statements in the foregoing quotation that support our position:

First. The proceedings had in a state court for the appropriation of private property to public use may be reviewed by the court to see whether any rule has been prescribed or applied in disregard of a landowner's right to just compensation.

Our contention is, and we believe it is perfectly obvious, we were denied the right to introduce evidence regarding the value of our land when considered in the light of all of its uses. Decisions of the Court are cited and discussed hereinafter on this point.

Secondly. The Court, in the *Backus* case, was of the view that since the land was appraised at most at $300,000, and only the use of the street in front of the plant was being taken whereas the judgment was for $63,000, that no glaring inadequacy was seen.

In our case there is a physical invasion of and taking of land. The land had a useful value for one purpose of

not less than $5,163,250, fixed by the only agency of the law that was permitted to hear all of the evidence. Petitioners were awarded $23,400 by a jury that heard only part of the evidence. We say the difference between the two sets of figures is glaring and obviously arose from something more substantial than weighing evidence.

Thirdly. This denial of right to us is something more than an error done in the administration of the law.

In respect of this appeal, the Court should also consider *Garrett* v. *Moore-McCormick,* 317 U. S. 239. In that case the plaintiff's right was based on Federal statute but certainly is not of more significance than the right to "just compensation" under the XIV Amendment. After a jury verdict, which the trial court overrode by granting judgment *non obstante veredicto,* the Supreme Court of Pennsylvania affirmed on the theory that the judgment of the trial court was based on procedural rather than substantive right.

The final judgment of the Oklahoma court is to the same effect. Its opinion clearly regards the right to introduce evidence and to have a full and candid hearing as purely procedural and as not burdened with any question of substantive rights.

We quote from 317 U. S. 239, at 245-246:

> "'So here in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling Federal law would be protected. Whether it did so raises a Federal question reviewable *here."

Petitioners' method of presentation undoubtedly was faulty, and in this particular. We regarded the jurisdictional statement form outlined in the rules as a "bare-bones" frame or outline of what our presentation would

be in our brief and argument later—that is: after jurisdiction was acknowledged. Our material in our jurisdictional statement is a "dry-as-dust" recital of the material justifying the taking of the appeal and arousing the attention of the Court to the substantial issues involved. Our conception of what is called for in the jurisdictional statement is an outline, without the argument or contentious material in a brief.

We further had the idea that our appeal would also be considered from the standpoint of certiorari as provided by statute, 28 U.S.C.A. 2103, and as exemplified by *May* v. *Anderson,* 345 U. S. 528, "on appeal to this Court, we noted probable jurisdiction. Inasmuch, however, as neither the Court of Appeals nor the Supreme Court of Ohio relied upon the Ohio statute alleged to be the basis of the appeal, we have treated the appeal as a petition for a writ of certiorari, granted it pursuant to 28 U.S.C. (Supp. V), Sec. 2103, * * *."

We may have given the Court the impression that the effect of the decision of the Oklahoma Court was limited to us and our property. Such is not the case. Turnpike's toll roads are becoming general in Oklahoma and are and will cross lands in rural areas capable of use other than farming and grazing. Surely the capacity of these lands for other uses will be present, and can be developed. Just as surely Turnpike should not be authorized to take these lands on the basis of their least valuable use.

Whether our right to have the decision of the Oklahoma Court reviewed is due us under 28 U.S.C. 1257 (2) or 1257 (3), petitioners have and do present to the Court an undoubted right to review. An Oklahoma statute has been construed (we think consciously) to deprive us of "due

process" of law. Turnpike has exercised the power of eminent domain granted to it by this statute, and the courts of Oklahoma have allowed Turnpike to exercise this power in a manner to deny petitioners "just compensation."

DISCUSSION.

Our appeal having been dismissed "for want of a substantial question," we address ourselves in this petition for rehearing to that part of our statement on appeal covered by *"statement of the grounds upon which it is contended the Federal questions involved are substantial."*

The two questions arise from and involve the refusal of the courts of Oklahoma,

(1) **to allow appellants to defend against the taking of their property for an alleged public use (a well established legal right under the XIV Amendment and Oklahoma law), and**

(2) **to allow appellants to introduce evidence regarding the value of their property for a certain use to which it was adaptable and being put.**

The value of appellants' property taken and destroyed was in the millions. $5,163,250.00 is the damage one Board of Commissioners found done to appellants. This board heard and considered the evidence rejected by the courts. $40,000.00 was the damage found by a subsequent board of appraisers, and $23,400.00 was the damage fixed by the jury at the trial—both of whom were denied the evidence appellants offered, had the right to introduce—and, which appellants had introduced at earlier steps in the proceeding.

Thus it is obvious that the admission or rejection of appellants' evidence made a difference in the awards of

more than $5,000,000.00. This is substantial in so far as the subject matter of the federal issues is concerned. The answer sought was the value of what we lost, *United States* v. *John J. Felin & Co.*, 334 U. S. 624.

The damage done to appellants is real. The adaptability of their property for this use was never questioned. Appellants had been warned away from dam-site No. 1, which was 60% complete. They were actually engaged in the construction of dam-site No. 2. The relocation of the toll road to cross dam-site No. 2, after appellants had moved from dam-site No. 1, was done in aggravated form in this: West of dam-site No. 2 the toll road was given a turn to the north, and east of appellants' land the angle of turn was reversed. This then is the appearance of dead aim at our dam-site No. 2. Had the toll road continued without these changes of direction, appellants dam-site would not have been touched, and the value of their land thus taken would not have much exceeded the damage found by the jury.

The locating of this toll road thus, when the locating of it 500 feet to the south would have preserved appellants' valuable property, should be taken into account along with the refusal of Turnpike to pay $5,163,250.00 into court as a condition to taking possession. Turnpike announced in open hearing it would not pay $5,163,250.00 for this right of way across appellants' dam site and lake sites. The alternative to this was again moving or re-locating the road, unless Turnpike could persuade a court—which it did—to limit appellants' evidence of value. Locating the road 500 feet south of dam-sites No. 2 and No. 3 would have left appellants comparatively undamaged.

When the Board of Commissioners fully informed (both appellants and Turnpike offered evidence) fixed damage at

$5,163,250.00 and Turnpike refused to pay such sum, and when thereafter another Board of Commissioners and later a jury, who were denied evidence on the value of an adaptable use, fixed damage at less than $50,000.00, appellants lost more than $5,113,250.00, and Turnpike gained a like sum. This enormous loss by appellants and gain for Turnpike turned solely on the denial of appellants' federal constitutional rights by the courts of Oklahoma. *United States* v. *John J. Felin & Co.*, 334 U. S. 634.

This result arises from the interpretation and application of 69 O. S. A. 1951, Section 658 (Laws 1947). The statute directs that Turnpike have and exercise the power of eminent domain according to the laws of Oklahoma—that is: the laws of Oklahoma sbstantive and procedural. We are not concerned with the procedural forms.

Prior to and subsequent to the decision which we seek to have reviewed the statutory and court law of Oklahoma on the substantive side provided for all landowners (*1*) the right to resist the taking of their property for an alleged public use by asserting a number of legal and factual defenses (*City of Tulsa* v. *Williams*, 100 Okl. 116, 227 Pac. 876; *Wrightsman* v. *Southwestern Natural Gas Company*, 173 Okl. 75, 46 P. 2d 925; and *Town of Ames* v. *Wybrant*, 203 Okl. 307, 220 P. 2d 693), and (*2*) the right to introduce evidence (on the trial of the issue of just compensation) of its adaptability to various uses to establish its value (*Grand Hydro* v. *G.R.D.A.*, 192 Okl. 693, 139 P. 2d 798, and *G.R.D.A.* v. *Grand Hydro*, 200 Okl. 159, 201 P. 2d 225, see 335 U. S. 359). Both of these rights are very definitely protected by the Federal Constitution. In so far as the decision of the Oklahoma court now under attack goes, it did not change the existing Oklahoma law as outlined above

so that what is now being complained about to this Court is not a change of viewpoint by a state court. But, the decision does change the existing Oklahoma law as to these parties, and as to any other parties who now or may hereafter occupy appellants' situation as against Turnpike. See *A. Backus & Son* v. *Fort Street Union Depot Company,* 169 U. S. 571.

The legal rights granted to other landowners and denied to appellants are valuable rights and substantial rights. They are founded upon substance and not upon mere forms or procedures. The statute involved does not on its face undertake to do what the Oklahoma courts have said it does; and we assert that had the statute in terms provided for such a result by specifically providing that landowners whose land was sought by Turnpike could not assert the legal defenses above mentioned, and on the issue of the value of the land to be taken could not show that the land had any value other than "rural land" it would undoubtedly be held to take away from the landowners substantive rights, and to be unconstitutional. The Supreme Court of the United States quoted with approval in 335 U. S. 369, the language of the Oklahoma Court in *G.R.D.A.* v. *Grand Hydro,* 200 Okl. 157, 201 P. 2d 225, 228:

> "The state cannot, through its law-making body, remove the principal value of private property, and, through its established agency acquire the property by condemnation, basing the reimbursement to the owner on the reduced value."

That is exactly what is being done here in our case. A substantial federal question is thus raised. The application of the statute by court decision to do what the statute does not in terms do cannot be less substantial in effect. The

denial of due process to appellants is as complete under the decision to be reviewed as if the statute had so said.

The parallel between this situation and the one involved in *G.R.D.A.* v. *Grand Hydro* is close. G.R.D.A. is an agency created by the Legislature of Oklahoma to conserve water resources, etc., and it undertook to acquire land for a dam site. In the trial on the issue of compensation, G.R.D.A. succeeded in having the trial court withdraw from the jury evidence given by Grand Hydro of the value of this land as a dam site. This ruling was based on the assumption that Grand Hydro could never use the land for that purpose. The verdict without this evidence fixed the compensation at $140,000.00, whereas on retrial with this evidence considered by the jury the verdict was $850,000.00. The Supreme Court of Oklahoma held (and the Supreme Court of the United States later approved) that evidence must be received of all possible, reasonable uses of land in order to fix compensation.

It is almost inconceivable that eminent domain on behalf of the federal government, with a statement of taking under 40 U. S. C. A. 258A on file, could be attacked as not being for a public use, and perhaps this is true as to any agency created by the Congress and declared to be for the public use. But, the Congress does authorize bodies corporate such as the Red Cross, foundations, patriotic societies and the like, to whom it does not give the power of eminent domain. It therefore can be questioned in the courts that the power of eminent domain can be conferred on them. We assert it would be a substantial *right* denied if the Congress in creating them and vesting in them such power had forbidden any property owner, whose property was being taken, a defense of law or fact against the taking of his property and had also provided that in establishing the

value of the property thus taken no account should be noted of its value except for its then residential use or farming use or some use of nominal value.

Let us offer this illustration of what has happened here. In Oklahoma the law is that a condemnor must negotiate with the landowner in an effort to buy the land before resorting to condemnation. In this case Turnpike not only made no effort but refused to negotiate, obviously because of the tremendous value of appellants' land and Turnpike's intention to destroy its greatest usefulness and value. At the time Turnpike should have negotiated in good faith, appellants were engaged in constructing dam-site and lake No. 2. The record discloses that had there been negotiations appellants would have fixed a price far in excess of ten million dollars—the value to them of their property for its intended use. Appellants had a perfect right to do this. *Mississippi and Rum River Boom Company* v. *Patterson*, 98 U. S. 403, 407-408, states:

> "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in the sale of property between private parties."

Such a price would not have been arbitrary, nor would it have been based on fictitious factors.

Turnpike chose to confiscate and not to purchase at true value. Turnpike obtained a ruling by a trial court that such intended use and the prospect of successful use therefor were so remote that no evidence could be received that would give any value to this use. Thereby Turnpike has been enabled to take appellants' land without their being able to show the jury its value for its adaptable use. What appellants could rightly negotiate for in trying to arrive at

a fair cash market value, they cannot show to a jury, by a decision of the Oklahoma Court.

There are many cases under the V and XIV Amendments saying about the value of land being taken: "Its capability of being made thus available gives it a market value which can be readily estimated." *Mississippi and Rum River Boom Co.* v. *Patterson,* 98 U. S. 403, 408.

Appellants dam site and lake site were taken as a right of way for a toll road. The courts of Oklahoma say the 35 acres was "rural land" and value it as rural land only. The Supreme Court of the United States cannot find in the opinion of the Supreme Court of Oklahoma by reference or by inference that appellants' land was claimed to have a value for the purposes for which appellants already at great expense were developing their property.

Does the fact appellants were using this land for one purpose and Turnpike desired it for another offer a legal basis for refusing to allow appellants to show its value for their intended use? In the *Mississippi River* case above (98 U. S. 410) is cited *Goodin* v. *Canal Co.,* 18 Ohio State 169, wherein a railroad company was condemning the bed of a canal for its track. The railroad company was trying to limit evidence of the value of the land being taken to its value for use as a canal bed only. The rule of evidence of value was stated thus:

> "* * * valuation was what the interest of the canal company was worth, not for canal purposes or any other particular use, but generally for any, and all uses for which it might be suitable."

In the same decision, 98 U. S. 410, is cited *Young* v. *Harison,* 17 Ga. 30, where land necessary for a bridge abutment was taken, and its value as a site for a bridge was allowed

to be shown (although, contrary to our case, it might never have been so used by the condemnee there). Its value was not limited to its "agricultural or productive" capacities. Appellants' land has been so damaged by Turnpike as to substantially destroy its value.

No question was raised about the capability of appellants' land being used as a dam site, nor that a lake capable of impounding water was in process of construction. These facts stand uncontradicted. The trial judge was of the opinion that appellants' chances of selling impounded water to others was "too remote." Evidence that it could be readily and profitably sold was refused admission.

We have to this point shown that our legal, substantive rights found genesis under the Federal Constitution, we have shown they were denied by the Supreme Court of Oklahoma, and we have shown that these rights are enormously valuable—that is, appellants' loss is in excess of $5,000,000.00. We do not know how else to show that a substantial federal question is involved except to cite similar cases for illustration. Before proceeding to do this, let us make the following comment.

We cannot disassociate this appeal and the rule of law from money. We had property. It had a value that is customarily stated in monetary terms. Appellants' property having been destroyed by Turnpike, they are now entitled to money that is its full and exact equivalent. "That equivalent is the market value of the property at the time of the taking contemporaneously paid in money." *Olson* v. *United States,* 292 U. S. 246.

The only manner in which value is ever fixed in condemnation cases is in terms of money. We are fully aware that the Court does not regard the amount of money either

small or enormous (as in this case) as the guiding criterion whether a federal question is substantial. We, therefore, assert that the federal questions we are presenting are substantial whether the loss of value is large or small.

Perhaps the next landowner who complains of this application of this particular statute may have a tract of land lying in a rural area that has a capability easily worth $5,000.00, whereas its agricultural value may not exceed $500.00. Perhaps another may own an unimproved city lot but will be unable to show its value as a building site because the trial judge, with approval of the Supreme Court of Oklahoma, may be of the belief it is too remote from business centers to attract tenants. To make it a little closer in fact to us, suppose the owner of the town lot is in the process of constructing his building. The rejection of evidence of its value as an office building would be highly prejudicial. In such an instance, a judgment of the Oklahoma Court as applied to Turnpike under 69 O. S. A. 1951, Sec. 658, would limit the issue of compensation to agricultural value or vacant lot value alone. However, the rule would be otherwise to other landowners and condemnors in Oklahoma.

Also, we cannot leave the Court with the impression that this decision applies to appellants alone, and that our complaint is the only one that can arise. One toll road has been built in Oklahoma, another is under construction, and at least two more are authorized. The opinion of the Oklahoma court now complained of is, and unless set aside will be the rule of law as to compensation where land is condemned under this statute. A class action or status is thus created.

All condemnors in Oklahoma, except Turnpike, are as a matter of legal obligation obliged to negotiate for the

purchase of or to have a jury fix value of land condemned which takes into account its value for all reasonable uses for which it is shown capable. Under the Oklahoma Supreme Court's opinion here attacked, Turnpike can take land for its agricultural value alone, and without any showing of right or need.

All landowners in Oklahoma can require all condemnors in Oklahoma, except Turnpike, to establish as a matter of fact and law their right to exercise the power of eminent domain and the necessity for taking the land as a condition precedent to any steps in condemnation; and, as against all condemnors except Turnpike, can defend in law and fact against the power and necessity for taking their land and have those issues determined before they are dispossessed and the value of their property determined. And, when it is proper to show to a jury the value of their property they can show "* * * not merely values of the property for the use to which it has been applied by the owner * * * but the possibility of its use for all purposes, present and prospective for which it is adapted and to which it may in reason be applied * * *." (*G.R.D.A.* v. *Grand Hydro,* 195 Okl. 693, 139 P. 2d 298, 800, affd. 335 U. S. 359, 367-368.)

This distinction in substantive rights between one condemnor and all others and the difference in legal right between one class of landowners and all others is not to be found elsewhere and is not to be countenanced under the Federal Constitution. This is a greater reason than any other present in our appeal why the questions urged are substantial federal questions.

We refer again to *Olson* v. *United States,* 292 U. S. 246, with full reliance upon its applicability here, to the rule stated:

"The judicial ascertainment of the amount that

shall be paid to the owner of private property taken for public use through exertion of the sovereign power of eminent domain is always a matter of importance for, as said in *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 324, 13 S. Ct. 622, 625, 37 L. ed. 463: 'In any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.' The statement in that opinion (page 326 of 148 U. S., 13 S. Ct. 622, 626) that 'no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner' aptly expresses the scope of the constitutional safeguard against the uncompensated taking or use of private property, for public purposes. *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 326, 399, 14 S. Ct. 1047, 38 L. ed. 1014."

Now, to comparative cases. Although we understand "due process" under the XIV Amendment as it relates to "just compensation" is identical with "just compensation" under the V Amendment, we intend to limit our citation of cases to those involving decisions on state laws.

Also we will cite such cases because they represent rulings by state courts on state statutes that are said to deprive persons of property without "due process" as a result of the language of the statute or the interpretation of the statute by the court. These cases, as well as ours, show not "mere judicial errors" but decisions which can be said to deny the party a trial according to a settled course of judicial proceeding.

Again we cite *Backus* v. *Fort Street Union Depot Company,* 169 U. S. 557, in which a decision of the Michigan court was reviewed to see among other things whether the

current decision holding that compensation should be fixed by a common law jury rather than by a jury of inquest as was formerly the rule offended against constitutional guaranties. This was held procedural and not offensive since opportunity for a full hearing had been afforded. By way of comparison of non-offending and offending rules, the Court said (169 U. S. 571):

> "The question is not presented of a distinct ruling by a state court that one party is entitled to certain rights and the benefits of certain modes of procedure, and that another party similarly situated is not entitled to them. An act of the legislature which in terms gave to one individual certain rights and denied to another similarly situated the same rights might be challenged on the ground of unjust discrimination and a denial of the equal protection of the laws."

In our petition in error and designated record herein we make and sustain that very discrimination.

We refer again to *McCoy* v. *Union Elevated Ry. Co.*, 247 U. S. 363, and without requoting the language of the *Backus* case quoted therein, we do quote the language thereof relating the rule of the case to us:

> "Our concern is not to ascertain whether the rule adopted by the state is the one best supported by reason or authority, nor with mere errors in course of trial, but with denial of a fundamental right."

In that decision it is noted that if the rule of law of the state court has the necessary result to deprive the owner of property without just compensation, then due process has been denied.

Roberts v. *City of New York*, 295 U. S. 264, is again relied upon. We are of the belief that the language, following a recital of various phrasings of the rule regarding

reviews on appeal from the taking of property without due process (277):

> "In condemnation proceedings as in lawsuits generally the Fourteenth Amendment is not a guaranty that a trial shall be devoid of error. *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63, 70, *ante* 761, 768, 55 S. Ct. 316. To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action."

And (278):

> "Enough for present purposes that when the hearing has been full and candid, there must ordinarily be a showing of something more far-reaching than one of dubious mistake in the appraisal of the evidence,"

applies here and fully justifies the correctness of our effort to obtain a review. Our evidence has not been received in the record, nor been taken into consideration by the jury. Our position is different; it is a case of arbitrary exclusion of our evidence which would sustain our constitutional rights. The exclusion of our evidence in the face of all rules favoring—even requiring its admission—smacks of something more far-reaching than a mere "dubious mistake in the appraisal of the evidence."

In *A., T. & S. F. Ry. Co.* v. *P. U. C.*, 346 U. S. 346, the Court entertained an appeal as involving a substantial federal question. The issues controverted, the rules of law discussed and the effects complained of were of no greater significance or substance than here. The issues of proper allocation of grade separation costs had been before the Court numerous times (cases cited 346 U. S. 352). In that case there was not involved a rejection of evidence touching upon a vital element of allocation. The primary issue

was whether the trial agency had correctly weighed the evidence of the parties in arriving at the allocation. The Court stated the issue:

> "The principal question presented is whether the allocation of the reasonable cost of grade separation improvements is arbitrary as to the railroads * * *."

The principle that a person's property may not be taken for a public use without just compensation applies to taxation, police power, eminent domain or any other governmental exaction, and no scheme under any of these heads which undertakes to force a selected few to carry the burden of promoting the public convenience of the general public can be sustained. Action under any statute or judgment that has such a result should be reviewed and corrected.

The purpose of Oklahoma in creating Turnpike as a quasi-public agency, if that is what it did, was to encourage automobile traffic, to supplement the state road system and implement safety at the cost of toll-payers. When the tolls have paid out a toll road title thereto vests in the State, subject to certain conditions. The less a road costs the sooner tolls will pay it out. Therefore, if Turnpike is enabled to acquire its right of way for less compensation to owners than would be the case if just compensation was paid under "due process," and less than other condemnors pay under similar conditions, appellants and others likewise affected are burdened to promote a supposed public interest in this arbitrary manner. Based on appraisal alone, it is costing appellants nearly $5,163,250.00 to carry the burden in order that Turnpike may progress. We do not know whether such confiscation is for the public interest, because the Oklahoma Court declined to consider this.

We call attention to *O'Neill* v. *Leamer*, 239 U. S. 244, in which this Court, without reference to money or value

in definite terms, entertained an appeal from the Supreme Court of Nebraska to see whether the alleged use for which the property was being taken was public or private. The Court said (249):

> "But we think that the plaintiffs sufficiently raised the question whether the appropriation was essentially for a private purpose, and hence contrary to the 14th Amendment, as amounting to a deprivation of property without due process of law, and that their contention as to their Federal right in this respect was denied by the state court. In this view jurisdiction attached (*Missouri P. R. Co.* v. *Nebraska,* 164 U. S. 403), * * *."

The designated portions of the record which we filed, and as to which Turnpike made no counter-designations and has not said to this Court in any manner that they are incorrect or inadequate, clearly show that the Oklahoma Court is of the opinion that appellants should not be allowed to question whether their property was being taken for public use.

In the *O'Neill* case this Court pointed out that it was assumed that the law of Nebraska is that reclamation projects must involve the public welfare before property can be appropriated therefor, saying (251):

> "Acts with a different purpose have been held unconstitutional."

The Court cannot indulge such an assumption here, for the refusal to allow appellants to question the existence of public interest inhering in the particular Oklahoma Turnpike Act means that the Oklahoma Court regards this character as immaterial.

In *Myles Salt Company* v. *Board of Commissioners,* 239 U. S. 478, the Court reviewed a judgment of the Su-

preme Court of Louisiana sustaining the assessment of drainage benefits, in which appeal it was contended (as it could be here) that the law as written was not offensive to the XIV Amendment, and that the decision of the state court applying it was a state matter without any federal aspect. This was rejected in this language (484):

> "We cannot concur in this contention. It is true the law of the state as written is not attacked, but the law as administered and justified by the Supreme Court of the state is attacked, and it is asserted to be a violation of the Constitution of the United States. The question presented is Federal and the motion to dismiss is denied."

Finally, the Court entertained jurisdiction of *G.R.D.A. v. Grand Hydro,* 35 U. S. 359, after initially denying certiorari to review the very narrow issue of the effect upon just compensation under the Oklahoma law of a federal act. Also, the Federal Government had lent the money from which this compensation was to be paid. In the state courts on first trial, evidence of the value of the land taken for a dam site was admitted and then withdrawn from the jury on the theory that the land had no such value because the owner had no right under state or federal law to build a dam at the place. The Supreme Court of Oklahoma reversed the trial court (192 Okl. 693, 139 P. 2d 798), holding the withdrawal of such evidence gave the owner less than just compensation. On retrial with such evidence in, a much larger value was found. This was approved (201 P. 2d 225) and an appeal to this Court by way of certiorari was first denied and then entertained, limited to the question whether the state rule allowing such value was wrong in view of the federal statute. The Court reviewed and approved the decisions of the Oklahoma Court defining just compensation.

The decision here for review violates grossly and obviously that definition beyond mere judicial error in weighing evidence, and in holding our evidence was wholly inadmissible as relating to an improper element of value.

Wherefore, upon the foregoing grounds, in light of the discussion herein, it is respectfully urged that this petition for rehearing be granted, and that the decision of November 14, 1955, be withdrawn and upon further consideration the final judgment of the Supreme Court of Oklahoma be reversed.

Respectfully submitted,

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No. 415. OWENS ET AL. *v.* OKLAHOMA TURNPIKE AUTHORITY. Appeal from the Supreme Court of Oklahoma. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Harry D. Moreland, Harold C. Stuart* and *Sam Clammer* for appellants. Reported below: 283 P. 2d 827.

No. 425. STRICKLAND *v.* SPURGIN, AM. LIVE